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# JURISDICTIONAL SALVATION AND THE HAGUE TREATY

Kevin M. Clermont†

## INTRODUCTION

The United States' law of territorial jurisdiction in civil cases is a mess. Many commentators, here and abroad, have said so for a long time.<sup>1</sup> The United States' treatment of foreign judgments, however, stands in contrast. As a well-behaved member of the international community of nations, the United States eagerly gives appropriate respect to foreign judgments, despite sometimes getting no respect in return.<sup>2</sup>

Now, ongoing negotiations at the Hague have generated a prospect for an international agreement on the reciprocal treatment of foreign judgments. The envisaged treaty would ensure mutual respect of judgments among contracting countries, but it would also require agreement on a sensible scheme of jurisdiction. Such a treaty would produce the great benefit of rationalizing U.S. jurisdictional law on the international level. Ironically, this treaty would hand lawmakers a bigger, but hidden, benefit in providing the opportunity to untangle the jurisdictional law applied at home. Rethinking jurisdiction through the process of treaty-making would permit the United States to improve its own interstate law. The Hague negotiations thus represent a major legal development, but they are proceeding without much professional awareness.

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<sup>1</sup> See, e.g., Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT'L & COMP. L. 111, 123 (1999) ("[T]he American house of jurisdiction to adjudicate is not a place where any sensible person other than a lawyer (if that is not redundant) wants to live."); Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1027 (1995) ("American jurisdictional law is a mess."). For a critical overview of territorial jurisdiction in the United States, see generally Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 423-29 (1981).

<sup>2</sup> See ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 368 (1993) ("The United States . . . appears to be the most receptive of any major country to recognition and enforcement of foreign judgments . . ."); *infra* note 28.

Part I of this Article describes the probable Hague treaty. Part II then paints the big picture of potential reform for U.S. jurisdictional law not only on the international level, but especially on the domestic level. However, as Part III discusses, the reform might raise constitutional questions. The reform probably would authorize jurisdiction formerly prohibited to U.S. courts and would push federal law into domains that state law currently occupies. This Article closes by arguing that the treaty-makers' and Congress's powers are broad enough to work the reform.

## I

### PATHS TO AND FROM A TREATY

European countries appear to be ahead of the United States on the reciprocal treatment of foreign judgments. The European Union has an enlightened, albeit far from perfect, treaty called the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.<sup>3</sup> Through this treaty, the member states agree to virtually automatic recognition and enforcement of the judgments of the other member states.<sup>4</sup> This provision is similar to the Full Faith and Credit Clause of the U.S. Constitution.<sup>5</sup>

In order to reach this agreement, the drafters of the Brussels Convention created a "double convention" by also defining the requisite bases of territorial jurisdiction.<sup>6</sup> This restriction functions in the same manner as the Due Process Clause<sup>7</sup> does among the states of the United States. All U.S. states submit to federal restrictions on how far they can reach jurisdictionally, and in return they fully realize the benefits of a judicially unified nation: they can confidently give, and thereby receive, full faith and credit in respect to sister-state judgments, because the states know that due process restricts all other states to appropriate territorial jurisdiction, as well as to basically fair procedure. Correspondingly, under the Brussels Convention, the Eu-

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<sup>3</sup> Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention], *reprinted as amended* in 29 I.L.M. 1413 (1990). On this Convention and the related Lugano Convention, see generally ALAN DASHWOOD ET AL., A GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION (1987), and Robert C. Reuland, *The Recognition of Judgments in the European Community: The Twenty-fifth Anniversary of the Brussels Convention*, 14 MICH. J. INT'L L. 559 (1993). On some of its shortcomings, see *infra* text accompanying notes 89-90, and on its revision currently under way, see *infra* note 170.

<sup>4</sup> See Brussels Convention, *supra* note 3, tit. III, *reprinted as amended* in 29 I.L.M. at 1424-28.

<sup>5</sup> U.S. CONST. art. IV, § 1.

<sup>6</sup> See Brussels Convention, *supra* note 3, tit. II, *reprinted as amended* in 29 I.L.M. at 1418-24. See generally Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 BROOK. J. INT'L L. 17 (1998) (discussing double conventions and their advantages and disadvantages).

<sup>7</sup> U.S. CONST. amend. XIV, § 1.

ropean member states can respect other members' judgments, because they know that the Convention restricts the others to appropriate jurisdictional reach. Europe is currently in the midst of an exciting time as the supranational European Court of Justice oversees the national courts and actively works out the details, much as the Marshall Court united the American judicial systems two centuries ago.

Of course, the Brussels Convention's definition of jurisdictional bases draws on the civil law tradition. Civil law embraced the Roman idea of jurisdictional restraint, which reflected a spirit of fairness.<sup>8</sup> *Actor sequitur forum rei* was a Justinian maxim pronouncing that the plaintiff follows the defendant's forum.<sup>9</sup> Generally, the civil law required the plaintiff to go to the forum at the defendant's domicile, and that forum could entertain any cause of action against the defendant regardless of where it arose. Eventually, there was additional provision for long-arm-like jurisdiction in actions of tort, contract, and property, so that, for instance, a plaintiff could sue for a tort at the place of wrongful conduct.<sup>10</sup> In other words, the civilian tradition differed from the U.S. tradition of tying jurisdiction to the power existing inside the sovereign's territorial boundaries,<sup>11</sup> with telling consequences.

Modern French jurisdictional law, as an example of continental law, accepts most of these civilian ideas for its law applicable outside the Brussels Convention.<sup>12</sup> On the one hand, without the impulses of the U.S. power theory, France has not produced excesses such as tran-

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<sup>8</sup> See generally RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 379-80, 405-06, 413-34 (6th ed. 1998) (illustrating the difference between civil and common law); Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1203-04 (1984) (discussing the Roman origins of the modern civil-law concept of jurisdiction).

<sup>9</sup> See Juenger, *supra* note 8, at 1203.

<sup>10</sup> See *id.*

<sup>11</sup> See *infra* text accompanying note 52.

<sup>12</sup> See NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] arts. 42-48 (Fr.); JEAN VINCENT & SERGE GUINCHARD, *PROCÉDURE CIVILE* 193-205, 222 (22d ed. 1991); Thierry Bernard et al., *France*, in 1 *TRANSNATIONAL LITIGATION* at FRA-1, FRA-12 to -23 (Richard H. Kriendler gen. ed., 1997); Christine Lécuyer-Thieffry, *France*, in *INTERNATIONAL CIVIL PROCEDURES* 241, 244-49 (Christian T. Campbell ed., 1995) (comparing French rules with Anglo-American principles and explaining French rules of international jurisdiction); Renée Y. Nauta & Gerard J. Meijer, *French Civil Procedure*, in *ACCESS TO CIVIL PROCEDURE ABROAD* 131, 140, 142 (Henk J. Snijders ed. & Benjamin Ruijsenaars trans., 1996).

sient jurisdiction<sup>13</sup> or attachment jurisdiction.<sup>14</sup> On the other hand, without the restraints of the power theory, France has succumbed even more blatantly to parochial impulses, such that Article 14 of its Civil Code authorizes personal jurisdiction for virtually any action brought by a *plaintiff* of French nationality (while Article 15 has the effect of making excessive any foreign state's exercise of jurisdiction over an unwilling French *defendant*).<sup>15</sup> Thus, a French person can sue at home whether or not the events in suit relate to France and regardless of the defendant's connections to France and interests in having the suit litigated elsewhere. The French approach to jurisdiction has emigrated with French law to other countries.<sup>16</sup> The forum-shopping potential of jurisdiction based on the plaintiff's nationality is evident, even though in practice this exorbitant jurisdiction may not be abused all that often.<sup>17</sup>

The Brussels Convention takes only the best of the civilian tradition regarding jurisdiction.<sup>18</sup> The defendant's domicile is the foundational idea,<sup>19</sup> although the Convention adds long-arm-like jurisdiction for tort and contract actions.<sup>20</sup> The Convention provides exclusive lo-

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<sup>13</sup> Under U.S. law, the ancient basis of presence gives the forum state power to adjudicate any personal claim if the defendant is served with process within the state's territorial limits. Thus, even momentary physical presence of the defendant at the time of service creates power to adjudicate a claim totally unrelated to that transient presence. For example, *P*, a Florida corporation, achieves in-state, in-hand service of process in a Louisiana action on *D*, a German attending a convention in New Orleans. The action concerns a contract between *D* and *P* for delivery of German goods to Florida. The court in Louisiana has personal jurisdiction. See *Amusement Equip., Inc. v. Mordelt*, 779 F.2d 264, 270-71 (5th Cir. 1985).

<sup>14</sup> In so-called attachment jurisdiction, the plaintiff seeks to apply the defendant's property to the satisfaction of a claim against the defendant that is unrelated to the property. For example, New York plaintiffs might obtain jurisdiction in a New York court for a tort claim arising from a plane crash in Turkey by garnishing a New York bank account belonging to the defendant, Turkish Airlines. If successful on the merits, the plaintiffs would apply the bank account to awarded court costs and then to the satisfaction of the tort claim. However, on such attachment jurisdiction, the plaintiffs' recovery is limited to the bank account. See *Feder v. Turkish Airlines*, 441 F. Supp. 1273, 1278-79 (S.D.N.Y. 1977).

<sup>15</sup> See CODE CIVIL [C. CIV.] arts. 14-15 (Fr.); YVON LOUSSOUARN & PIERRE BOUREL, *DROIT INTERNATIONAL PRIVÉ* 489-97 (4th ed. 1993); PIERRE MAYER, *DROIT INTERNATIONAL PRIVÉ* 198-203 (4th ed. 1991).

<sup>16</sup> See, e.g., Brussels Convention, *supra* note 3, art. 3, reprinted as amended in 29 I.L.M. at 1418 (listing the signatories' exorbitant jurisdiction, thereby illustrating the emigration of French law to Belgium and Luxembourg). Incidentally, the Convention not only preserves this exorbitant jurisdiction against outsiders, but also extends any existing plaintiff-based jurisdiction from the country's nationals to its domiciliaries as plaintiffs. See *id.* art. 4, reprinted as amended in 29 I.L.M. at 1419.

<sup>17</sup> See Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111, 115-16 (1998).

<sup>18</sup> See generally STEPHEN CROMIE, *INTERNATIONAL COMMERCIAL LITIGATION* 3-29 (1990).

<sup>19</sup> See Brussels Convention, *supra* note 3, art. 2, reprinted as amended in 29 I.L.M. at 1418.

<sup>20</sup> See *id.* art. 5, reprinted as amended in 29 I.L.M. at 1419.

cal jurisdiction in actions concerning real property and the like,<sup>21</sup> and it allows certain disadvantaged plaintiffs, such as consumers, to sue at home.<sup>22</sup> The Convention also authorizes forum selection clauses.<sup>23</sup>

On the prohibited side, each member state gave up its exorbitant jurisdiction,<sup>24</sup> but only as against domiciliaries of other member states.<sup>25</sup> So, France gave up jurisdiction based on the plaintiff's French nationality. England, too, is now a signatory and has relinquished transient and attachment jurisdiction. Furthermore, the Convention not only prohibits exorbitant jurisdiction, but also makes mandatory the permissible bases of jurisdiction. Accordingly, England abandoned its judicial practice of sometimes declining jurisdiction on expressly discretionary grounds,<sup>26</sup> but again only when the Convention applies.<sup>27</sup>

However, the European approach is not always better than U.S. law when it comes to jurisdiction or judgments. The Brussels Convention openly discriminates against outsiders, as it applies only to defendants domiciled in a signatory state. Accordingly, although France cannot use its exorbitant jurisdiction in a suit by a French person against an English person, it can use the exorbitant jurisdiction when the defendant is an American instead. Moreover, the resulting French judgment would receive virtually automatic recognition and enforcement in England against the American or the American's assets located in England.

Similarly, recognition and enforcement of judgments under the Brussels Convention do not extend to judgments rendered by a country that is not a signatory state. The European countries, in fact, traditionally have been, and continue to be, rather stingy in extending respect to foreign judgments not covered by treaty. Indeed, in this regard, most countries in the world have demonstrated a more heightened notion of sovereignty than what the United States would endorse. Even if a U.S. judgment passes the foreign court's jurisdictional reexamination, which may well involve meeting all the standards of the foreign jurisdictional law, the foreign court often im-

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<sup>21</sup> See *id.* art. 16, *reprinted as amended* in 29 I.L.M. at 1422.

<sup>22</sup> See *id.* arts. 13-15, *reprinted as amended* in 29 I.L.M. at 1421-22.

<sup>23</sup> See *id.* art. 17, *reprinted as amended* in 29 I.L.M. at 1422.

<sup>24</sup> See *id.* art. 3, *reprinted as amended* in 29 I.L.M. at 1418.

<sup>25</sup> See *id.* art. 4, *reprinted as amended* in 29 I.L.M. at 1419.

<sup>26</sup> See Rules of the Supreme Court, Order 11 (Eng.), *reprinted in* 1 THE SUPREME COURT PRACTICE: 1988, at 79-97 (Jack I.H. Jacob gen. ed., 1987); LOWENFELD, *supra* note 2, at 178-80, 199-201.

<sup>27</sup> See Richard G. Fentiman, *Jurisdiction, Discretion and the Brussels Convention*, 26 CORNELL INT'L L.J. 59, 60 (1993).

poses other obstacles, such as reexamining the merits to ensure that the applied law conforms to local policy.<sup>28</sup>

A hypothetical example will drive home the astounding reality. Assume that Apple Pi, a New Yorker with property in England, had a car collision at home in Ithaca, New York, with Franc Delta, a law professor from France. Imagine that Franc sues Apple in Paris. This jurisdiction is fine under France's Article 14, being personal jurisdiction based on the plaintiff's French nationality. Moreover, a judgment for Franc will be entitled under the Brussels Convention to recognition and enforcement against Apple's property in England. Now assume conversely that the collision occurred in Paris. Imagine that Pi sues Delta in New York. Jurisdiction based solely on the plaintiff's U.S. nationality is impermissible under U.S. law. If a default judgment were rendered, neither France nor England would enforce it, because the judgment is invalid for lack of personal jurisdiction. Even a litigated judgment would enjoy far less than automatic recognition and enforcement abroad.

Thus, U.S. citizens are being whipsawed. Not only are they still subject to the far-reaching jurisdiction of European courts and the wide enforceability of the resulting judgments, but also U.S. judgments tend to be given short shrift in European courts. This situation is untenable for the United States, even if at the present time the problems are more often theoretical than real.<sup>29</sup> Consequently, in 1992 the United States initiated an ongoing push to conclude a multilateral treaty on jurisdiction and judgments through the Hague Conference on Private International Law.<sup>30</sup>

The United States continues to work hard to produce agreement at the Hague with the Europeans, who hold the primary adverse interests in the negotiations. Despite the United States' market power, it

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<sup>28</sup> See ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD 66-70 (Ronald A. Brand ed., 1992); JOSEPH M. LOOKOFSKY, TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION 491-558 (1992); LOWENFELD, *supra* note 2, at 368-69, 439-54; *see also, e.g.*, MAYER, *supra* note 15, at 230-33 (discussing French law's treatment of foreign judgments). *But cf.* Patrick J. Borchers, *A Few Little Issues for the Hague Judgments Negotiations*, 24 BROOK. J. INT'L L. 157, 159 (1998) (observing that arbitration reduces the need for a judgments treaty); Juenger, *supra* note 17, at 114-16 (downplaying enforcement concerns); Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 170-73, 178-84 (1998) (stressing the lack of empirical data on whether the United States needs a judgments convention).

<sup>29</sup> See Kathryn A. Russell, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action*, 19 SYRACUSE J. INT'L L. & COM. 57, 78-80 (1993). *But see* Juenger, *supra* note 17, at 114-16.

<sup>30</sup> For the background of the Hagne negotiations, see Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOK. J. INT'L L. 7 (1998).

brings little bargaining power to the table: although the Europeans have an interest in a more certain and restrained American jurisdictional law, they already receive mightily favorable treatment of their own judgments, and they still can balk at huge American awards.<sup>31</sup> Nonetheless, in October 2000 or at its next quadrennial meeting after that, the Hague Conference likely will approve a treaty for signature, ratification, and implementation. The expectation is that this eventual multilateral convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters will be similar to the Brussels Convention.<sup>32</sup>

This eventuality means that the United States might soon abandon—on the international level among signatory countries<sup>33</sup>—transient jurisdiction, attachment jurisdiction, and “doing business” as a basis for general jurisdiction.<sup>34</sup> The Europeans’ principal objection to

<sup>31</sup> See Borchers, *supra* note 28, at 157-59; Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, LAW & CONTEMP. PROBS., Summer 1994, at 103, 138-39 (discussing the problem of “unilateral generosity . . . that . . . may weaken U.S. bargaining power”); Juenger, *supra* note 17, at 113-14, 116-18, 119-20. One way to create bargaining power would be for the United States to reinvigorate the old rule of reciprocity from *Hilton v. Guyot*, 159 U.S. 113, 228 (1895), but practically speaking that is unlikely to happen.

<sup>32</sup> For the best, albeit avowedly tentative and incomplete, description of the content of the eventual treaty, see *Preliminary Draft Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters*, Hague Working Doc. No. 241 (June 18, 1999) [hereinafter *Treaty Draft*]; *Preliminary Draft Out Line to Assist in the Preparation of a Convention on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, Hague Conf. Info. Doc. No. 2 (Sept. 1998) [hereinafter *Treaty Outline*]; see also Catherine Kessedjian, *Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, Hague Conf. Prelim. Doc. No. 9 (July 1998) [hereinafter *1998 Synthesis*] (referring to corresponding sections of the Brussels Convention); Catherine Kessedjian, *Synthesis of the Work of the Special Commission of June 1997 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, Hague Conf. Prelim. Doc. No. 8 (Nov. 1997) [hereinafter *1997 Synthesis*] (referring to specific sections of the Brussels Convention as examples). On the possibility of a mixed convention instead of a double convention, see *infra* text accompanying note 142.

<sup>33</sup> See *Treaty Outline*, *supra* note 32, art. 2 (delineating the treaty’s geographical scope).

<sup>34</sup> Presence and domicile, which rest on supposedly strong contacts between the defendant and the forum state, give the state power to adjudicate any personal claim whether or not the claim is related to those contacts. Thus, these bases support “general jurisdiction,” which denotes the existence of personal jurisdiction for any claim whatsoever against the defendant. They workably provide a predictably certain and usually fair forum.

Additionally, if a defendant’s business activities in the forum state when served with process are extensively continuous and systematic—which is phrased as “doing business” as opposed to merely “transacting business”—the defendant becomes subject to jurisdiction even on claims wholly unrelated to the in-state activities. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952) (upholding jurisdiction in an Ohio state-court suit against a Philippine corporation, which was temporarily performing all of its management activities in Ohio while mining was suspended by the effects of war in the Philippines, on a basically unrelated claim); cf. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-19 (1984) (finding that Texas had no general jurisdiction over a foreign corporation, but not reaching the difficult issue of more specific jurisdiction). In this way, the



U.S. jurisdictional law is its proclivity to base general jurisdiction on rather thin contacts, namely, allowing any and all causes of action to be brought on the basis of the defendant's physical presence, property ownership, or doing business in the forum. They do not object to specific jurisdiction,<sup>35</sup> as long as a rules-based approach controls its mandatory application. Thus, jurisdiction under the treaty would exist at the unconsenting defendant's *habitual residence* or the place where a *specific part of the events* in suit occurred, but would not extend to the broader bases of jurisdiction now authorized by U.S. law. In exchange, the United States would get other countries to respect its judgments and also to renounce their own exorbitant jurisdiction.

The path to international agreement is not smooth. The Brussels Convention, for instance, provides for so-called derivative jurisdiction, another idea coming from French law.<sup>36</sup> This provision permits personal jurisdiction over codefendants, as long as jurisdiction based on domicile exists over one defendant, and permits personal jurisdiction over any third-party defendants.<sup>37</sup> Americans, used to testing personal jurisdiction separately and independently for each defendant, find this doctrine so foreign that they have trouble even comprehending it.<sup>38</sup> How should the negotiators compromise on this point? Does the European laxity rest primarily on administrative convenience? Does the American fetish derive primarily from its power heritage? What does fairness dictate?<sup>39</sup> Because of this point and many more signifi-

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development of the state-directed-act basis has revealed the absence of a clear distinction between general and specific jurisdiction; and this kind of mixed jurisdiction arguably combines general jurisdiction's risk of unfairness with the uncertainty of specific jurisdiction.

<sup>35</sup> Consent and state-directed acts, which rest on lesser contacts between the defendant and the forum state than does general jurisdiction, give the state power to adjudicate only those personal claims related to the contacts. Thus, these bases support "specific jurisdiction," a term that denotes personal jurisdiction for related claims only. They provide useful and indeed necessary jurisdiction, but can give rise to some very difficult problems of line-drawing.

<sup>36</sup> See N.C.P.C. art. 42, para. 2 (Fr.) ("*S'il y a plusieurs défendeurs, le demandeur saisit, à son choix, la juridiction du lieu où demeure l'un d'eux.* [If there are several defendants, the plaintiff can choose the jurisdiction of any defendant's domicile.]"); *id.* art. 333 (third-party practice); PETER HERZOG, CIVIL PROCEDURE IN FRANCE 193-95 (1967).

<sup>37</sup> See Brussels Convention, *supra* note 3, art. 6, *reprinted as amended in* 29 I.L.M. at 1419-20.

<sup>38</sup> U.S. doctrine, however, is not so pure on closer inspection. When territorial jurisdiction becomes an especial impediment to multiparty litigation, the U.S. approach is to overlook the requirement altogether. Examples include the involuntary plaintiff doctrine, *see* RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 1280-81 (7th ed. 1997), vouching in and other extensions of privity, *see id.* at 1179-83, 1205-06, and class actions, *see id.* at 220 & n.m. Perhaps a comparative study of derivative jurisdiction could lead U.S. law toward a rational and clear set of rules, within the rather permissive bounds of due process, that would specify the binding reach of litigation for such special situations.

<sup>39</sup> See 1998 *Synthesis*, *supra* note 32, at 38-40.

cant points—and given the United States' spotty record in procedural treaty-making<sup>40</sup>—it is far from a certainty that the parties will reach agreement on a treaty.<sup>41</sup>

Reaching agreement on a multilateral treaty, or even merely drafting the best U.S. proposal, could yield great returns. On the international level, of course, a treaty would resolve the whipsawing predicament in which U.S. citizens today find themselves regarding jurisdiction and judgments, while moving the world toward justice without regard to international boundaries.<sup>42</sup> On the domestic level, the treaty effort might inspire Congress to enact the treaty's or the U.S. proposal's jurisdictional provisions as domestic law, as Italy recently has done with the Brussels Convention.<sup>43</sup> That is, Congress could legislate that federal and state courts, not only in all international cases but also in interstate cases, possess jurisdiction only if the case's circumstances satisfy the treaty's or the proposal's analogous jurisdictional provision. Thus, with salvation coming from an unexpected direction, the United States might achieve the optimal law on territorial authority to adjudicate, an optimum upon which this Article will elaborate next: a law under which constitutional limits fade into the background and legislative rules move to the fore by providing certainty and restraint.

## II

### NET BENEFITS OF REFORM

To get an idea of the benefits of a Hague judgments and jurisdiction treaty for civil cases, one first must briefly review the current U.S. law regarding treatment of judgments and territorial jurisdiction. The treaty directly would change the U.S. law in much of international litigation and might induce reform in regard to domestic litigation as well.

Today a U.S. court will recognize, or in other words give effect under the doctrine of *res judicata* to, a U.S. judgment that is valid and

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<sup>40</sup> See Weintraub, *supra* note 28, at 168-69.

<sup>41</sup> See Borchers, *supra* note 28, at 157; Juenger, *supra* note 17, at 121; Weintraub, *supra* note 28, at 220.

<sup>42</sup> See Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237, 1238-41 (1998).

<sup>43</sup> See Law No. 218 of May 31, 1995, art. 3(2), *Gazzetta Ufficiale della Repubblica Italiana* [Gazz. Uff.], Supp. Ord. No. 128, June 3, 1995 (Italy), translated in 35 I.L.M. 765 (1996) ("Italian courts shall further [beyond when the defendant has an Italian domicile or residence] have jurisdiction according to the criteria set out in [the long-arm provisions in Articles 5-15 of the Brussels Convention], including when the defendant is not domiciled in the territory of a contracting State . . ."); Margreet B. de Boer, *Italian Civil Procedure*, in ACCESS TO CIVIL PROCEDURE ABROAD, *supra* note 12, at 313, 323-26. The jurisdictional provisions of the Italian statute appear in this Article's Appendix.

final.<sup>44</sup> For a judgment to be valid, generally speaking, the rendering court must have had territorial jurisdiction, as well as possessing subject-matter jurisdiction and providing adequate notice. When the second court faces the question of whether the prior judgment is valid and final, it should apply the law of the judgment-rendering sovereign, which of course is subject to any applicable higher restraints, such as the Due Process Clause and other federal provisions that are imposed on and become part of state law.<sup>45</sup> When the second court faces a question of *res judicata* based on the prior judgment, it similarly should apply the law that the rendering court would apply, including any applicable higher restraints.<sup>46</sup> Furthermore, the second court will enforce a judgment entitled to recognition.<sup>47</sup> However, with respect to the method of enforcement, the second court applies its own law, subject to the proviso that the method should not be so complex or expensive as to burden unduly the enforcement of nondomestic judgments.

U.S. courts treat judgments of foreign nations much like U.S. judgments, although they approach foreign judgments more flexibly, because respect for foreign judgments flows from comity rather than from constitutional obligation.<sup>48</sup> U.S. courts give respect to foreign judgments not only because finality is a fair and efficient policy, but also because U.S. courts hope to encourage abroad similar respect for their own judgments.

As a U.S. court owes respect only to valid foreign judgments, it can ask whether territorial jurisdiction existed under the foreign law. But, because the U.S. court has no guarantee that a foreign judgment, although comporting with the basic requirements of the foreign law, is minimally acceptable to U.S. justice, it will not recognize or enforce a foreign judgment resulting from proceedings that failed to meet the

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<sup>44</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93 (1971) (amended 1988); RESTATEMENT (SECOND) OF JUDGMENTS §§ 86-87 (1982).

<sup>45</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 92, 107 (1971).

<sup>46</sup> See *id.* §§ 94-97 (amended 1988).

<sup>47</sup> See *id.* §§ 99-102.

<sup>48</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (1987); Weintraub, *supra* note 28, at 173-77. Oddly enough, thus far international law itself has played no real role in the U.S. treatment of foreign judgments, except to the extent that the U.S. approach is already a manifestation of the generally recognized principles that constitute part of international law. The United States has not a single treaty on the subject.

Indeed, in a diversity action, according to the post-*Erie* case law, the federal court looks to state law on recognition of a foreign judgment. See, e.g., *Bank of Montreal v. Kough*, 612 F.2d 467, 469 (9th Cir. 1980). However, an argument could be made that in all federal cases, and even in all state cases as well, federal law should govern because of the federal interest in foreign relations. See John Norton Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 265. A treaty would, of course, federalize the law on recognition of a foreign judgment. See Harold G. Maier, *A Hague Conference Judgments Convention and United States Courts: A Problem and a Possibility*, 61 ALB. L. REV. 1207, 1219 (1998).

basic American notions of due process.<sup>49</sup> Therefore, the consensus is that the U.S. court can examine whether the foreign assertion of jurisdiction would have satisfied the U.S. tests of due process.<sup>50</sup> In other words, the U.S. court not only will apply the foreign law's limitations on territorial jurisdiction, but more importantly will ask whether the foreign court's jurisdiction would have passed U.S. due process muster, as if the U.S. Constitution controlled the foreign law.

Treatment of judgments thus leads inevitably to consideration of jurisdictional law. The well-known basic U.S. law on jurisdiction that comes from the Due Process Clause is this: the forum state acquires the requisite adjudicatory authority through *power* over the target of the action (be it a person or a thing), unless litigating the action there is *unreasonable* (that is, fundamentally unfair)—although the forum state can choose the *self-restraint* of exercising less than its full adjudicatory authority.<sup>51</sup>

The treaty's impact would be greatest on jurisdictional law. This impact, however, should be welcome, because the need for jurisdictional reform is great. Before exploring the treaty's potential impact, this Article will sketch the need for reform in connection with each of the three key aspects of jurisdictional law: power, unreasonableness, and self-restraint.

#### A. Inappropriateness of Power

The critical defect in the U.S. law of territorial jurisdiction is the persistence of the power test. Through criticism of the role of power in U.S. jurisdictional law, this Article will further describe the doctrine. The power test creates five different problems.

First, the power test is *unjustified* in terms of rationale. As traced in the next three paragraphs, the rationale has changed with time from an arid sovereignty theory to an instrumentalist jurisdictional allocation and then to a redundant fairness concern.

The United States, prompted by the inherent tensions among states in a federation, early adopted a theory of exclusive power based on territoriality. The theory originated with the seventeenth-century Dutch theorist Ulric Huber, who contended that each sovereign had jurisdiction, exclusive of all other sovereigns' jurisdictions, to bind

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<sup>49</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(1) (1987).

<sup>50</sup> See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 968-74 (3d ed. 1996).

<sup>51</sup> For a synopsis of basic U.S. jurisdictional law, see generally KEVIN M. CLERMONT, CIVIL PROCEDURE 142-66 (5th ed. 1999), and KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 1-25 (1999).

persons and things present within its territorial boundaries.<sup>52</sup> However, the principal thrust of the U.S. power theory was not authorization, not a delineation of the outer bounds of actual sovereign power. True, courts used the theory to justify nonrecognition of judgments of foreign courts lacking jurisdiction. More significantly, though, courts used the theory to impose self-limitation, to specify when the sovereign should choose not to exercise its actual power. After all, any full sovereign had the raw power to adjudicate any dispute when and how it pleased, as well as the power to enforce its adjudication on persons and things over which it eventually acquired physical power. Yet, sovereigns did not act this way. Jurisdictional law was a limit on how far the sovereign would reach to exercise its existing power, a limit imposed not only in the hope that other sovereigns would restrain themselves similarly, but also increasingly with the intuition that such restraint was fair. In other words, the power theory never linked to raw power, but served merely as a metaphorical label for jurisdictional actualities. Accordingly, power was never the true rationale of U.S. jurisdiction in any realistic sense. The true rationale was always the desirable allocation of jurisdictional authority.<sup>53</sup>

With time, U.S. courts came to think openly of power as an odd label for the rough pursuit of some unclear notion of reciprocal sovereignty, the notion that State 1 would not reach far into State 2's domain in exchange for State 2's restraint in analogous cases.<sup>54</sup> The rationale thus became more instrumentalist, aimed directly at a desirable allocation of jurisdiction. Eventually, however, the Supreme Court explicitly abandoned this instrumentalist rationale of jurisdictional allocation, ruling that sovereigns' interests do not reside in the Due Process Clause or in the jurisdictional doctrine, which the defendant might elect not to raise.<sup>55</sup> Instead, the Court shifted the due process power test onto the individual's liberty interest in not being subject to the illegitimate power of a foreign sovereign.<sup>56</sup>

The continuing difficulty is that the power test as now applied does not try to map the limits of the sovereign's power over the individual, whatever they might be. Instead, the power test requires the individual's tacit consent to jurisdiction and tends to find this consent

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<sup>52</sup> See James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73, 74-85 (1990) (discussing Huber's *De Conflictu Legum* of 1684); see also James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 Sr. Louis U. L.J. 1 (1992) (applying historical lessons to transient jurisdiction).

<sup>53</sup> See Strauss, *supra* note 42, at 1250-63.

<sup>54</sup> See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-94 (1980).

<sup>55</sup> See *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 & n.10 (1982).

<sup>56</sup> See *id.* at 702 ("[The jurisdictional requirement] represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").

when fair.<sup>57</sup> The power test seems ill designed to serve such a fairness rationale. A reasonableness test serves it more clearly.

Second, the highly *conceptual* power test naturally begets conceptual quagmires. For instance, despite the undeniable fact that all actions really affect the interests of people, the image of power inevitably raised the question of power over whom or what. That is, to measure the strength of the power relation between the sovereign and the target of the action, the law had to specify the target of the action. Thus arose the categorization of territorial jurisdiction into jurisdiction over persons and things.<sup>58</sup>

Having established these categories of territorial jurisdiction, the U.S. courts elaborated the various bases of jurisdiction within each category. A basis provided the requisite power in the particular category, such as personal jurisdiction's bases of physical presence, domicile, consent, and forum-directed acts. When the dust finally settled, the common element among the various bases emerged as a requirement that the relation of the target of the action to the sovereign constitute at least "minimum contacts."<sup>59</sup> The defining feature of this inquiry into power is its focus on the target of the action, or more particularly on the target's contacts with the sovereign, as opposed to a broader inquiry that would take account of the plaintiff's or the public's interests.

The power test has led to a whole series of pseudorules within each jurisdictional basis, which manage to be complicated, yet fail to work as true rules. Illustratively, loose play is evident in the proposition that power exists over an individual or corporation by virtue of forum-directed acts for claims arising out of its local transaction of business, tortious acts, property ownership or use, or litigating acts such as commencement of a suit. This pseudorule leaves everything to case-by-case adjudication. Also, the power test has led to barren conceptual approaches to the other bases of jurisdiction. The excesses and irrelevancies of fictional consent provide an example.<sup>60</sup>

Third, the power test remains *undefinable* and hence difficult to apply. It never produced exclusive jurisdiction. The power test's multiple bases rendered impossible any jurisdictional exclusivity: one sovereign might have personal jurisdiction because of the defendant's presence or the local effects of the defendant's acts, while another

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<sup>57</sup> See Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. Rev. 529, 534-50 (1991).

<sup>58</sup> See generally RESTATEMENT OF JUDGMENTS introductory note to ch. 1, at 5-9 (1942).

<sup>59</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>60</sup> See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) (suggesting that acceptance of a directorship could constitute consent to jurisdiction).

sovereign might also have personal jurisdiction based on the defendant's domicile or consent to jurisdiction.

As one state's territorial jurisdiction more evidently came to overlap other states', the power test also became increasingly abstract. Instead of looking only to physical presence, courts looked to the in-state effects of the defendant's acts or even to the quality and nature of the acts.<sup>61</sup> More and more obviously, the several bases for personal jurisdiction invoked sovereign power in only a metaphorical sense: minimum contacts, which would satisfy the power test, existed whenever the defendant's activities constituted purposeful availment of the benefits and protections of the forum's laws.<sup>62</sup> This elaboration evolved uncontrollably far beyond physical power. Ultimately, the Supreme Court has come to require "a sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum."<sup>63</sup> This inquiry into the fairness of exercising power over the defendant must turn on the interests of others; therefore, the power test is inevitably eroding into a reasonableness test. In fact, the Court recently has gone even further, observing that fairness "considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."<sup>64</sup> This subversive observation could spell the demise of the power test. For the present, the power test remains a complicated way station, and it yields unpredictable results.

Fourth, the would-be predictable power test remains somewhat *inflexible*, achieving any suppleness only through obscurity. The power test oddly manages to be both undefinable and inflexible by placing its slippery minimum contacts standard within a rigid doctrinal framework. Its limited lists of categories and bases, and also concepts like the split between general and specific jurisdiction, supply the rigidity. Consequently, the power test readily can respond neither to the socio-economic-political impulses that push jurisdiction, nor to simple case variety. Its reactions have been clumsy and costly, necessitating complicated doctrinal adjustments to stretch or shrink jurisdictional reach.<sup>65</sup>

The need for flexible reaction to change is considerable in the jurisdictional realm. Throughout history, jurisdiction has evolved

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<sup>61</sup> See, e.g., *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766 (Ill. 1961) (upholding jurisdiction based on the stream of commerce).

<sup>62</sup> See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>63</sup> *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978).

<sup>64</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (Brennan, J.).

<sup>65</sup> See Paul D. Carrington & James A. Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 228-30 (1967) (describing the evolution of jurisdictional law); Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 272-81 (reviewing the ebbs and flows of the power theory).

largely in response to socio-economic-political pressures, as well as to changes in technology and even philosophy.<sup>66</sup> Evolving societies, intermeshing economies, and shifting politics have compelled the courts not only to multiply the categories and bases of power, but also to stretch and contract them.<sup>67</sup> Many aspects of life's complexities have affected the evolution of jurisdiction. The development of the business corporation, like the arrival of the automobile, had an earth-shaking impact on jurisdiction.<sup>68</sup> The revolutions in transportation and communication have increased the frequency of long-distance disputes, but simultaneously have decreased the burden of long-distance litigating.<sup>69</sup> The twentieth century's philosophical shift from laissez-faire to social-welfare has favored plaintiffs' desire for long jurisdictional reach, yet a more recent pro-business outlook has produced cutbacks to protect defendants from litigiousness.<sup>70</sup> Truistically, the only constant is change.

Fifth, the determinative drawback of the power test is that it gives self-evidently *wrong* answers, whether applied as a sufficient or as a necessary condition. On the one hand, power always has existed over a defendant passing through the sovereign's territory, and so U.S. law apparently persists in upholding transient jurisdiction over a defendant flying through the forum's air space.<sup>71</sup> Such jurisdiction could be unfair to the defendant. On the other hand, the power test can aid a defendant by defeating jurisdiction over corporate officials in the state of incorporation when their alleged breach of fiduciary duty occurred out-of-state.<sup>72</sup> This application of the power test ignores the interests of states and persons other than the defendants.

## B. Uncertainty of Unreasonableness

The United States Supreme Court's landmark case of *Pennoyer v. Neff*<sup>73</sup> in 1878 imposed the power theory on the states, choosing as the source of its authority the Due Process Clause of the Fourteenth

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<sup>66</sup> See Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1150-62 (chronicling the influence of credit dependency on jurisdiction in early colonial America).

<sup>67</sup> See Carrington & Martin, *supra* note 65, at 228-30; Hazard, *supra* note 65, at 272-81.

<sup>68</sup> See Carrington & Martin, *supra* note 65, at 228-29.

<sup>69</sup> See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) ("[P]rogress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome." (quoting *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958))).

<sup>70</sup> See, e.g., *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987).

<sup>71</sup> See *Grace v. MacArthur*, 170 F. Supp. 442, 444-45 (E.D. Ark. 1959).

<sup>72</sup> See *Shaffer v. Heitner*, 433 U.S. 186, 213-17 (1977). For other examples of the impeding power test, see *supra* note 38 and *infra* note 82.

<sup>73</sup> 95 U.S. 714 (1878).



Amendment.<sup>74</sup> That choice was another step in undermining the power theory, however, as due process notions irresistibly have pushed the courts to consider fairness. Indeed, this impulse has been all the more powerful because the courts have elaborated the U.S. law of territorial jurisdiction largely on the interstate level, where fair treatment of U.S. defendants possesses a natural appeal.

The end result of this jurisdictional elaboration has been the overlaying of an unreasonableness test onto the power test, as the Supreme Court did in the classic case of *International Shoe Co. v. Washington*<sup>75</sup> in 1945. The test of unreasonableness balances the opposing parties' interests, along with the public's interests in the litigation.<sup>76</sup> It also takes into account a diverse and complete set of relevant considerations, such as the actualities of the choice-of-law process. Although rather uncertain in application, this party-neutral and all-things-considered test directly measures jurisdiction by the pertinent standard of "fair play and substantial justice"<sup>77</sup>—the minimal floor of fundamental fairness.

Therefore, for a U.S. court to uphold territorial jurisdiction today, it must apply both tests. The tests are cumulative in the sense that power must exist and its exercise must not be unreasonable. The Supreme Court has ruled that while the plaintiff has the burden of persuasion as to power, it is up to the opponent to show unreasonableness.<sup>78</sup> To reflect this burden of persuasion, the test is here called the unreasonableness test rather than the reasonableness test.

The unreasonableness test might be *undefinable* with any real precision, but it offers some offsetting benefits. These benefits contrast with the power test's corresponding shortcomings. First, the unreasonableness test embodies the readily *justified* rationale of fundamental fairness. Second, the unreasonableness test remains conceptually *straightforward*.<sup>79</sup> The subdivision into categories of jurisdiction over persons and things is not necessary in applying the unreasonableness test. True, there might be circumstances in which it would not be unreasonable to cut off a nonresident's interest in local land, but it would be unreasonable to render a money judgment against the nonresident. Yet this difference is the outcome of balancing all factors, including the relief at stake, with no need to label or to treat the former as in rem and the latter as in personam. Additionally, the unreasonableness test has not produced complicated accretions of case law

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<sup>74</sup> See *id.* at 722-23.

<sup>75</sup> 326 U.S. 310 (1945).

<sup>76</sup> See *id.* at 320.

<sup>77</sup> *Id.*; see also Clermont, *supra* note 1, at 451-52.

<sup>78</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985).

<sup>79</sup> See Clermont, *supra* note 1, at 453.

analogous to the bases of power. The courts have decided many cases that give meaning to the unreasonableness standard, but the case law does so by dividing the mountain of cases into the two piles of reasonable and unreasonable, rather than creating a complex set of pseudorules. Third, *flexible* application is the hallmark of the unreasonableness test, as it readily relaxes or tightens in response to socio-economic-political pressures and technological and philosophical changes.<sup>80</sup> This free-form test can adjust effortlessly to changing times and changing needs. In brief, conceptual baggage is not its problem. Fourth, the unreasonableness test, acting in accord with its fairness rationale, produces results that appear *right*.

Why, then, has the power test not withered away, leaving in its place some sort of reasonableness test? The reason is that courts continue to hope that the power test will mitigate the uncertainty of a case-specific fairness test. Courts remain strangely hopeful, despite the experience of centuries proving that the power test itself always has been highly uncertain in application, and despite the evident instability of the current jurisdictional doctrine.

Is the current unreasonableness test in fact fatally infected by the evil of uncertainty? Initially, one should bear in mind that complete certainty is unachievable. Moreover, one should remember that certainty is never the only goal. With that said, the uncertainty of the unreasonableness test is neither severe nor undesirable. On the one hand, the test is not all that uncertain, as courts through their many decisions have given it definite meaning in all but unusual cases.<sup>81</sup> On the other hand, the unreasonableness test should not be wholly certain. It is a constitutional limitation after all, and thus should impose a flexible outer boundary that prevents jurisdictional excess in particular, unforeseeable circumstances. The Constitution is not the place to seek certainty. Law should seek certainty by subconstitutional regulation, short of the constitutional outer limits. In concrete terms, legislators should specify that suit be brought only in the more convenient, efficient, and otherwise desirable of all the reasonable forums. Moreover, courts should not routinely reach all the way to the limits of due process, just as they do not punish to the point of cruel and unusual punishment. Courts should operate safely distant from outer limits by applying the legislative restraints on jurisdiction.

Here, indeed, is a crucial point. The truly troubling type of uncertainty occurs when outsiders cannot determine when they are safely beyond jurisdictional reach. They then cannot shape their primary behavior to ensure that they will not have to travel to defend

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<sup>80</sup> See *id.*

<sup>81</sup> See Geoffrey C. Hazard, Jr., *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems*, 66 CORNELL L. REV. 564, 571-72 (1981).

themselves. Due process and jurisdictional law should work to protect the outsiders from unfair jurisdiction and also from this type of uncertainty. Consider the two constitutional tests. The unreasonableness test does not generate this type of uncertainty as to inclusion within jurisdiction. Albeit rarely called upon, this test protects the outsiders from exorbitant jurisdiction. It functions as a backup test to block jurisdiction when, in a particular case, the power test and any other jurisdictional rules permit a fundamentally unfair exercise of jurisdiction. It thereby might create some uncertainty, but only in the nature and to the extent of its exclusion from jurisdiction. In contrast, the power test produces the costly type of uncertainty—uncertainty of inclusion rather than exclusion—as a result of its fuzzy outer limits. If uncertainty is an evil, the power test surely aggravates it now and will never overcome it. Deliverance lies in clear legislative, rather than constitutional, regulation of territorial authority to adjudicate.

In summary, the U.S. constitutional law on jurisdiction, which combines the power and the unreasonableness tests, is complicated and uncertain. Moreover, it does not do an optimal job of distributing cases on a geographic basis. This situation comes as no surprise. The limits and failures of the current constitutional doctrine demonstrate that the Supreme Court has tried to do too much in shaping the law of territorial jurisdiction out of the few bare words of a constitutional clause. Nothing in the Court's raw material—the Constitution, subject to judicial interpretation—can generate a set of criteria that would be both sensible and certain. Legislative regulation is necessary.

The Supreme Court should recognize its own limitations. It should abandon the power test and apply only a reasonableness test as the constitutional outer limit.<sup>82</sup> This generalization is instructive: applying a *reasonableness test* is a *judicial function*, but implementing the *power test* is a *legislative function*. The shift to a reasonableness test would allow the Court to continue playing its role in policing the states' excesses in extending their reach, while the abandonment of the power test would represent the Court's withdrawal from the task of allocating jurisdiction among the states.<sup>83</sup> The former of these two roles also might be somewhat legislative by nature, but due process

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<sup>82</sup> See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312-13 (1950) (applying only a reasonableness test to uphold New York's jurisdiction for a settlement of accounts to cut off nonresident beneficiaries' personal rights against their trustee—a clearly desirable outcome that would be difficult to reach under today's power test). The Court in *Mullane* abandoned the power test and accordingly refused to categorize the action. However, the Court never again applied this futuristic approach.

<sup>83</sup> See Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on International Shoe and Its Progeny*, 28 U.C. DAVIS L. REV. 965, 968-69 (1995).

jurisprudence has given this function of protecting individual rights to the courts. This role conforms to the traditional and proper one for the Court in applying the Due Process Clause. The latter task of allocating jurisdiction falls largely in the realm of policymaking, and it has been awkward to squeeze this function into the rubric of the Due Process Clause.<sup>84</sup> This task seems purely legislative in nature and fully in need of legislatures' capabilities. Moreover, if the Court left to legislatures the task of narrowing the choice among reasonable forums, and if legislatures performed this task, then the remaining constitutional limit of reasonableness could fade into the background.<sup>85</sup>

### C. Proposal for Rationalized Subconstitutional Regulation

The United States, then, needs legislative regulation of territorial authority to adjudicate. Legislatures, however, have thus far relied mainly on the Constitution and the courts to supply the law of territorial jurisdiction.<sup>86</sup> Many long-arm statutes expressly incorporate by reference the constitutional tests. The other long-arm statutes require active judicial interpretation, and most often the courts have managed to strip them of any specific guidance they might have provided.

Legislatures should therefore undertake a much more serious effort in siting cases in convenient, efficient, and otherwise desirable courts. Preferably after wiping the jurisdiction and venue slate clean, their statutes should set out general rules—usually siting cases at the defendant's habitual residence or where a specific part of the events in suit occurred<sup>87</sup>—and should do so in the language of venue. Such statutes should embrace a rules-based approach to territorial authority to adjudicate and resist the allure of individualized fact-specific analysis.<sup>88</sup>

The statutes should give outsiders clearer guidance as to which activities will not subject them to local suit. Clearer guidance is possible, although perfect clarity is obviously an impossibility. Suggestions

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<sup>84</sup> See Clermont, *supra* note 1, at 446 & n.161.

<sup>85</sup> Cf. Goldstein, *supra* note 83, at 994-96 (arguing for a move from a "maximalist" to a "minimalist" reasonableness test).

<sup>86</sup> See generally 1 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS §§ 4.01-09 (2d ed. 1991).

<sup>87</sup> For a suggestive specialized effort, see Carol S. Bruch, *Statutory Reform of Constitutional Doctrine: Fitting International Shoe to Family Law*, 28 U.C. DAVIS L. REV. 1047 (1995). For more general proposals, see Edward L. Barrett, Jr., *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 627-35 (1954); David P. Currie, *The Federal Courts and the American Law Institute* (pt. 2), 36 U. CHI. L. REV. 268, 299-311 (1969); Albert A. Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 OR. L. REV. 103, 111-13 (1971).

<sup>88</sup> As a safety valve for special cases, legislatures could retain a role for courts by authorizing them to transfer a particular case's venue in the interest of justice, similar to that under 28 U.S.C. § 1404(a) (1994). See Clermont, *supra* note 1, at 450 & n.186.

that the Brussels Convention has achieved great clarity are unfounded.<sup>89</sup> It attempted to satisfy and reconcile the needs of a variety of different countries and legal systems, using vague and simplistic formulas that were sometimes poorly drafted and always expressed in multiple languages. It has induced the complicated interplay of European and national laws, and it operates without the benefit of much authoritative clarifying case law. Thus, in Europe, there is still a lot of litigating about where to litigate.<sup>90</sup> After all, jurisdictional problems remain problems because they are hard problems. Nevertheless, intelligent reform can nudge the law on the spectrum toward certainty.

The new legislation on U.S. jurisdictional law should provide greater restraint as well as greater certainty. The need for restraint exists because basic fairness is at stake, and choice of forum has a tremendous impact on outcome. At least the practitioners know that forum-shopping is the name of the game. Litigants expend vast amounts of time and money on the fight over forum. Why? Because the forum affects the chances of winning, and hence the value of settlement. Accordingly, legislatures should seek to create a fair law of territorial jurisdiction.

Recent empirical work on transfer of venue<sup>91</sup> and removal<sup>92</sup> shows that the majority of practitioners are not acting irrationally. Utilizing a database of the three million civil cases terminated in the federal district courts over recent years, the research shows, for example, that the plaintiffs' rate of winning drops from 58% of judgments in cases where there was no transfer to 29% in transferred cases.<sup>93</sup> That is to say, plaintiffs win much more often when they get to choose the forum.

Admittedly, transferred cases are very different in kind from non-transferred cases. Grouping together transferred cases results in a concentration of cases that are hard to win against apparently aggres-

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<sup>89</sup> See C.G.J. Morse, *International Shoe v. Brussels and Lugano: Principles and Pitfalls in the Law of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 999, 1012-25 (1995). But see, e.g., Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121 (1992) (arguing that the Brussels Convention creates clarity and that U.S. jurisdictional law could benefit from emulating the Convention by legislation).

<sup>90</sup> See Morse, *supra* note 89, at 1010-12.

<sup>91</sup> See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995) [hereinafter Clermont & Eisenberg, *Forum-Shopping*]; Kevin M. Clermont & Theodore Eisenberg, *Simplifying the Choice of Forum: A Reply*, 75 WASH. U. L.Q. 1551 (1997).

<sup>92</sup> See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 606-07 (1998) (showing that removal from state to federal court reduces a 50% chance of the plaintiff's winning to 39%, a comparable "forum effect" that reflects the plaintiff's loss of forum advantage).

<sup>93</sup> See Clermont & Eisenberg, *Forum-Shopping*, *supra* note 91, at 1511-13.

sive defendants, partly explaining the drop in win rate. However, the observed effect of a dropping win rate prevails across the range of substantively different types of cases. Moreover, the statistical technique of regression helps to isolate the effect of transfer on outcome. Controlling for case category, amount demanded, procedural development at termination, method of disposition, and kind of subject-matter jurisdiction, one finds that transfer persists in reducing a 50% chance of the plaintiff's winning to 40%.<sup>94</sup>

The reductive effect of transfer on the win rate is not surprising. Transferred cases comprise those cases where the forum advantage would be the greatest. After all, the plaintiff had tried to forum-shop, the defendant had chosen to fight back, and the court in granting transfer had decided that the forum really mattered. The transferred plaintiffs lost the forum advantage and thus litigated less successfully in the unfavorable forum against the defendants. The win rate, therefore, dropped. This effect of transfer, as shown on judgments, influences all nonjudgment settlements and other resolutions. The forum does matter, apparently not so much because of choice of law as because of strongly shifting inconveniences and changing biases.

There is a normative lesson here, too. Given the nature of transfer, the transferee forum is usually a more just forum giving a more accurate outcome. Transfer removes the plaintiff's forum advantage when the "interest of justice" so counsels,<sup>95</sup> and therefore removes the plaintiff's opportunity to gain an unjust victory in litigation or to achieve an unjust settlement. Transfer works to neutralize any lopsided cost advantage and thereby to equalize the effectiveness of the two sides' litigation expenditures. Thus, the outcome should be more accurate in the transferee court. Note that transfer does not shift the choice of forum from plaintiff to defendant, but instead from plaintiff to judge. Moreover, the judge decides to transfer only in rather extreme cases of forum-shopping, normally deferring to the presumption in favor of the plaintiff's selected forum. In short, the transferee forum generally should be a better forum affording a better outcome.

In brief, forum matters, in terms of outcome and justice. Consequently, plaintiffs frequently choose a forum to obtain an advantage—if only to sue at home, as they often do. Transfer offsets the advantage, but transfer occurs only in 1% to 2% of federal civil cases. Therefore, plaintiffs sometimes manage to forum-shop their way to victory. As a result, an unfilled role exists for a robust law of territorial authority to adjudicate, which should ensure that the plaintiff is choosing initially from a limited list of fair forums.

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<sup>94</sup> See *id.* at 1518-25 & n.39.

<sup>95</sup> 28 U.S.C. § 1404(a) (1994).

Note that all of the foregoing discussion on the importance of forum concerned litigation within the United States. Consider now international litigation. The choice of forum becomes much more important. Shifting inconveniences and changing biases from a local forum to a foreign forum become staggeringly effective in determining outcome. Moreover, the international differences in substantive and procedural law, as well as the differences in remedies and expenses, dwarf the small variations within U.S. law. What is the forum's law on antitrust, will there be a jury, how big will be the award of damages and will they be trebled, and can the plaintiff's lawyer proceed on a contingent fee and will the loser have to pay the winner's expenses? Because of all the different answers to these questions, each nation's legal system really needs to worry about the law of territorial jurisdiction.

In sum, because the choice of forum can affect a case's just outcome and because the plaintiff currently has a wide choice, lawmakers should take a progressively more restrictive approach to territorial authority to adjudicate in both state and federal law. If the state legislatures prove reluctant to restrain their own courts, then Congress could intercede to legislate general limits on the states' interstate and international reach by utilizing its powers under the Due Process Clause, Full Faith and Credit Clause, and Commerce Clause,<sup>96</sup> not to mention its powers with respect to foreign relations.<sup>97</sup> Moreover, on the international level the United States should continue to pursue a multilateral treaty that would provide both restraint and certainty.

#### D. Salvation via Treaty

##### 1. *International Law*

If the United States accepts a Hague judgments and jurisdiction treaty similar to the Brussels Convention, it would take a giant step on the international level toward the reform proposed in this Article. The treaty would succeed in downplaying the due process tests by generally satisfying them comfortably through its restrained and fairly certain subconstitutional regulation.

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<sup>96</sup> See Borchers, *supra* note 89, at 154-55; Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 104-05 & nn.542-43 (1990); Clermont, *supra* note 1, at 442 n.139; Israel Packel, *Congressional Power to Reduce Personal Jurisdiction Litigation*, 59 TEMP. L.Q. 919 (1986) (discussing the Commerce Clause); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* (pts. 1 & 2), 14 CREIGHTON L. REV. 499, 735 (1981).

<sup>97</sup> See Patrick J. Borchers, *Judgments Conventions and Minimum Contacts*, 61 ALB. L. REV. 1161, 1164-66 (1998).

a. *Judgments.* A Hague treaty appears quite desirable for the treatment of foreign judgments.<sup>98</sup> The United States would get returns for the respect it is already according other nations' judgments.

An obvious concern with a multilateral treaty is that it might force the United States to respect distasteful foreign judgments. The United States is confident about sister-state judgments, but there the Due Process Clause applies, with the United States Supreme Court to review its application. Perhaps the United States could muster confidence in the judgments of a small number of like-minded legal systems—a confidence similar to that displayed by the European Union countries in their Brussels Convention, which was part of a much broader unification project.<sup>99</sup> A worldwide treaty, however, is altogether another matter. The United States could not be sure of the fundamental fairness of all foreign judgments. Accordingly, the treaty must have, and will have, a provision giving each signatory country broad control over which countries can sign on vis-à-vis that country,<sup>100</sup> as well as narrowly drawn public-policy exceptions for procedural due process violations and other repugancies.<sup>101</sup>

More massive and probably more troubling than the judgment provisions' effect is the treaty's impact on the jurisdictional side.<sup>102</sup> The treaty would take the specification of jurisdictional reach partly out of U.S. hands and deliver it into the embrace of international law. This Article now turns to the details of that change.

b. *General Jurisdiction.* A Hague treaty likely would mean that the United States would abandon transience, attachment, and doing business as bases for general jurisdiction on the international level among signatory countries. The Europeans argue that the contacts of the defendant's physical presence, property ownership, or doing business in the forum are too thin to allow bringing any and all causes of action. The Europeans are right on that point.

*Transient*, or tag, jurisdiction<sup>103</sup> has long enjoyed judicial approval in the United States, and it is constitutional, as long as its application is not so outlandish that it is unreasonable in the particular circumstances.<sup>104</sup> However, it also has long been the recipient of criticism

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<sup>98</sup> See *Treaty Draft*, *supra* note 32, ch. iii.

<sup>99</sup> But see Brussels Convention, *supra* note 3, art. 27(1), reprinted as amended in 29 I.L.M. at 1424 (providing nonrecognition "if such recognition is contrary to public policy in the State in which recognition is sought").

<sup>100</sup> See *Treaty Outline*, *supra* note 32, art. 40; 1998 *Synthesis*, *supra* note 32, at 46-47.

<sup>101</sup> See *Treaty Draft*, *supra* note 32, art. 27bis(1); 1998 *Synthesis*, *supra* note 32, at 20-21; Andreas F. Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the von Mehren Report*, LAW & CONTEMP. PROBS., Summer 1994, at 289, 291-92.

<sup>102</sup> See *Treaty Draft*, *supra* note 32, ch. ii.

<sup>103</sup> See *supra* note 13.

<sup>104</sup> See LAWRENCE W. NEWMAN & MICHAEL BURROWS, THE PRACTICE OF INTERNATIONAL LITIGATION at I-120 to -121 (2d ed. 1999); see also *Sarieddine v. Moussa*, 820 S.W.2d 837, 840



from academics and foreigners alike.<sup>105</sup> Formerly the most important basis of U.S. jurisdiction, but today far from essential, it is occasionally used to sue foreigners in the United States, even though the resulting judgments would be unlikely to receive recognition or enforcement abroad.<sup>106</sup> Indeed, transient jurisdiction is necessary only when the appropriate bases of jurisdiction are unavailing.

Given transient jurisdiction's dubious propriety and general un-necessariness, the United States should be, and seems to be, willing to accept the treaty's prohibition.<sup>107</sup> Perhaps, however, the United States should insist on a new provision for jurisdiction against terrorists and human rights violators, against whom the human rights community has relied on tag jurisdiction.<sup>108</sup>

*Attachment jurisdiction*<sup>109</sup> also was formerly quite useful. If the plaintiff had any claim against the defendant but failed to acquire personal jurisdiction, the plaintiff could proceed against any of the defendant's property within the state, such as a bank account. Upon attachment, the defendant usually defaulted and the resulting judgment allowed the plaintiff to apply the property to satisfy the claim. The plaintiff could later bring a separate suit on any unsatisfied portion of the claim, either in personam or again by this subtype of quasi in rem jurisdiction against other property.

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(Tex. App. 1991) (rejecting implicitly the minority opinion of Justice Scalia in *Burnham v. Superior Court*, 495 U.S. 604, 607 (1990), which had suggested that transient jurisdiction merely by its historical pedigree always satisfies the unreasonableness test).

<sup>105</sup> See BORN, *supra* note 50, at 121-23; MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE 78 (1995) (explaining that most Western European countries do not recognize transient jurisdiction); Stephen B. Burbank, *The United States' Approach to International Civil Litigation: Recent Developments in Forum Selection*, 19 U. PA. J. INT'L ECON. L. 1, 13-14, 18 (1998); Peter Hay, *Transient Jurisdiction, Especially over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593, 599-601; Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 613-16 (1991); Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1296-97 (1998) (explaining that transient jurisdiction conflicts with international standards).

<sup>106</sup> See DAVID EPSTEIN & JEFFREY L. SNYDER, INTERNATIONAL LITIGATION § 6.04[3] (2d ed. 1994); LOUISE ELLEN TEITZ, TRANSNATIONAL LITIGATION § 1-6, at 50-52 (1996).

<sup>107</sup> See *Treaty Draft*, *supra* note 32, art. 20(2)(f) (prohibiting jurisdiction based on "the service of a writ upon the defendant in that State"); *id.* art. 20(2)(i); Weintraub, *supra* note 28, at 189-90; Russell J. Weintraub, *Negotiating the Tort Long-Arm Provisions of the Judgments Convention*, 61 ALB. L. REV. 1269, 1278-79 (1998).

<sup>108</sup> See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 248 (2d Cir. 1995) (holding that an invitee of the United Nations is not immune from personal service of process); 1998 *Synthesis*, *supra* note 32, at 30 n.53. Perhaps the treaty should cut the tie to tag jurisdiction and instead provide for jurisdiction over such wrongdoers, as well as other kinds of elusive individual and corporate defendants, under the rubric of jurisdiction by necessity. See *infra* text accompanying note 122. Or the treaty could skirt this problem by permitting nations to exercise such jurisdiction under a so-called mixed convention. See *Treaty Draft*, *supra* note 32, art. 20(4); *infra* text accompanying note 142.

<sup>109</sup> See *supra* note 14.

In the course of history, attachment jurisdiction facilitated the industrialization of America.<sup>110</sup> Today the needs that generated it are much less intense, because personal jurisdiction has expanded. Nevertheless, the courts wastefully have had to work out the doctrinal implications and complications and to control the abuses allowed by this ancient form of jurisdiction. The result has been many years of criticism of attachment jurisdiction.

In the leading case of *Shaffer v. Heitner*<sup>111</sup> in 1977, the Supreme Court made clear that nonpersonal jurisdiction also must pass the unreasonableness test, thereby meeting the criticism but minimizing the usefulness of attachment jurisdiction.<sup>112</sup> Under this test, mere presence of some bit of the defendant's property is not enough to render reasonable the entertaining of a claim totally unrelated to the attached property, even if the defendant's liability were limited to the value of that property. Something more—an adequate relation of the forum, the parties, and the litigation—has to exist before a court will, in its subjective opinion, deem an exercise of jurisdiction to be fundamentally fair.

The result of *Shaffer* is that this subtype of quasi in rem jurisdiction is now available only in four rather special situations. In the following examples of those situations, attachment jurisdiction would be reasonable and hence constitutional in the situs forum, which hypothetically is New York:

- 1) An Ohio plaintiff sues by attaching an Iowa defendant's land in New York in order to secure a judgment being sought by the plaintiff in California for personal injuries stemming from a traffic accident with the defendant in California.<sup>113</sup>
- 2) An Ohio plaintiff sues by attaching an Iowa defendant's land in New York in order to enforce a judgment already rendered for the plaintiff in California for personal injuries stemming from a traffic accident with the defendant in California.<sup>114</sup>
- 3) An Ohio plaintiff sues by attaching an Iowa defendant's land in New York in order to recover for personal injuries stemming from a traffic accident with the defendant in New York. If a state constitutionally could exercise personal jurisdiction, it may choose to allow the plaintiff to cast suit in the form of attachment jurisdiction.<sup>115</sup>

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<sup>110</sup> See Kalo, *supra* note 66, at 1159-62.

<sup>111</sup> 433 U.S. 186 (1977).

<sup>112</sup> See *id.* at 207-12.

<sup>113</sup> See *id.* at 210; Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1048-49 (N.D. Cal. 1977). New York might require legislative authorization of any particular form of jurisdiction, and its legislature has not in fact authorized this sort of anticipatory attachment. See DAVID D. SIEGEL, NEW YORK PRACTICE § 104, at 177 (3d ed. 1999).

<sup>114</sup> See *Shaffer*, 433 U.S. at 210 n.36; Biel v. Boehm, 406 N.Y.S.2d 231 (Sup. Ct. 1978).

<sup>115</sup> See *Shaffer*, 433 U.S. at 208 & n.29; LAWRENCE W. NEWMAN & DAVID ZASLOWSKY, LITIGATING INTERNATIONAL COMMERCIAL DISPUTES 35 (1996). Arguably, the Privileges and

4) An Ohio plaintiff sues by attaching a French defendant's property in New York in order to recover for personal injuries stemming from a traffic accident with the defendant in Japan. Attachment jurisdiction in New York is thought to be constitutional, if personal jurisdiction is not available in any other U.S. forum.<sup>116</sup> This situation would be a surviving example of so-called jurisdiction by necessity, in which the unavailability of an alternative U.S. forum helps make attachment jurisdiction reasonable. Other factors could help to establish reasonableness, such as the need of the plaintiff or some link between the cause of action and the attached property. Power is no problem, because the property is present in New York.

Attachment jurisdiction in the first or second situation is perfectly appropriate, and accordingly the treaty would authorize this jurisdiction for security<sup>117</sup> and enforcement.<sup>118</sup> Nonpersonal jurisdiction in the third situation becomes completely unnecessary once the sovereign extends personal jurisdiction to appropriate lengths.<sup>119</sup> Finally, jurisdiction in the fourth situation remains constitutionally shaky. It receives regular criticism, although it actually sees little use.<sup>120</sup> The United States should be, and seems to be, willing to surrender that use.<sup>121</sup> Perhaps the United States should push for a safety clause narrowly authorizing jurisdiction by necessity, but probably this ill-developed concept remains too vague for introduction into an international convention.<sup>122</sup>

A more controversial jurisdictional basis is *doing business*<sup>123</sup>—a peculiarly U.S. doctrine<sup>124</sup> that establishes general jurisdiction over a defendant who extensively conducts continuous and systematic activities within the forum. It entails terrible problems of line-drawing and does not conform to the usual rationale of general jurisdiction.<sup>125</sup> Be-

Immunities Clause of the Constitution prohibits actual seizure solely for this unnecessary formalism. See Richard W. Bourne, *The Demise of Foreign Attachment*, 21 CREIGHTON L. REV. 141, 191-95 (1987).

<sup>116</sup> See *Feder v. Turkish Airlines*, 441 F. Supp. 1273, 1278-79 (S.D.N.Y. 1977) (approving such jurisdiction after *Shaffer*); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66 cmt. d (1969) (amended 1988); cf. *Shaffer*, 433 U.S. at 211 n.37 (leaving the constitutional question open).

<sup>117</sup> See *Treaty Draft*, *supra* note 32, art. 14(2).

<sup>118</sup> See *id.* art. 20(3)(c) (listing enforcement as a permitted basis).

<sup>119</sup> See Michael B. Mushlin, *The New Quasi In Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 BROOK. L. REV. 1059, 1116-27 (1990).

<sup>120</sup> See *id.* at 1095-96, 1100.

<sup>121</sup> See *Treaty Draft*, *supra* note 32, art. 20(2)(a) (prohibiting general jurisdiction based on "the presence or the seizure in that State of property belonging to the defendant"); 1997 *Synthesis*, *supra* note 32, at 61 (preserving presence of property as a basis for specific jurisdiction).

<sup>122</sup> See 1998 *Synthesis*, *supra* note 32, at 37 (describing the general lack of enthusiasm for a "denial of justice" clause).

<sup>123</sup> See *supra* note 34.

<sup>124</sup> See REIMANN, *supra* note 105, at 77.

<sup>125</sup> See BORN, *supra* note 50, at 103-16.

cause it requires the defendant to be so active in the forum as to seem like a native, the doctrine is seldom properly available against a defendant from abroad.<sup>126</sup> Again, this basis arose to provide appropriate jurisdiction when specific jurisdiction was not yet fully available; but today U.S. courts resort to it only when all appropriate bases of personal jurisdiction do not reach the defendant.<sup>127</sup>

Given the shortcomings of doing-business jurisdiction, the United States also should abandon this basis in the treaty.<sup>128</sup> The more common forms of activity-based jurisdiction that fall more solidly within specific jurisdiction would survive,<sup>129</sup> and all other bases of specific jurisdiction under the treaty also would be available.<sup>130</sup>

Thus, general jurisdiction under the treaty likely would exist on the sole<sup>131</sup> basis of the defendant's *habitual residence*.<sup>132</sup> The United States must be willing to surrender something in the negotiating process, in order to have other countries respect U.S. judgments and renounce their own exorbitant bases of jurisdiction. Those tired old doctrines—the questionable and unnecessary doctrines of transient, attachment, and doing-business jurisdiction—are offensive to the Europeans, while U.S. interest groups and the United States Senate are apt to feel only limited passion in their defense. By giving in on

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<sup>126</sup> See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984) (holding that “mere purchases, even if occurring at regular intervals, are not enough to warrant a State’s assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions”). But see RUSSELL J. WEINTRAUB, *INTERNATIONAL LITIGATION AND ARBITRATION* 6 (2d ed. 1997) (citing questionable counterexamples).

<sup>127</sup> See, e.g., *Frummer v. Hilton Hotels Int’l, Inc.*, 227 N.E.2d 851, 854 (N.Y. 1967); see also Weintraub, *supra* note 28, at 187-89 (explaining that the elimination of doing-business jurisdiction “will block suit in only a few cases in which the United States has a legitimate interest in providing a forum”).

<sup>128</sup> See *Treaty Draft*, *supra* note 32, art. 20(2)(e) (prohibiting general jurisdiction based on “the carrying on of commercial or other activities by the defendant in that State”); 1998 *Synthesis*, *supra* note 32, at 29-30; Weintraub, *supra* note 107, at 1277-78; Zekoll, *supra* note 105, at 1294-95.

<sup>129</sup> See 1998 *Synthesis*, *supra* note 32, at 30 (preserving “transacting business” as a basis for specific jurisdiction).

<sup>130</sup> See, e.g., *infra* text accompanying note 170 (describing consumer-contract jurisdiction).

<sup>131</sup> The United States also authorizes general jurisdiction based on the defendant’s status as a U.S. citizen. See *Blackmer v. United States*, 284 U.S. 421, 438 (1932) (upholding statute giving authority to the United States to exercise jurisdiction over an absent citizen who fails to obey a subpoena); BORN, *supra* note 50, at 95-99. In accordance with the trend in international law, the treaty might, and should, eliminate this rarely used basis. See *Treaty Draft*, *supra* note 32, art. 20(2)(c); 1997 *Synthesis*, *supra* note 32, at 61-63.

<sup>132</sup> See *Treaty Draft*, *supra* note 32, art. 3; E.M. Clive, *The Concept of Habitual Residence*, 1997 *JURID. REV.* 137 (defining habitual residence); Hay, *supra* note 105, at 600 n.56. The treaty will not define habitual residence, but the treaty’s autonomous law will govern the question. For a corporation, the treaty will authorize general jurisdiction where it is incorporated or has its statutory seat, central administration, or principal place of business. See *Treaty Draft*, *supra* note 32, art. 3.

general jurisdiction, the United States also could gain bargaining power on specific jurisdiction, which is worth arguing over.

c. *Specific Jurisdiction.* The Europeans do not object to specific jurisdiction. Thus, jurisdiction under a Hague treaty would exist where a specific part of the events in suit occurred. The battle is over the exact terms. Admittedly, the drafting task is complicated, but that only proves the need for the effort. The exercise of specifying which of the constitutional forums are the more convenient, efficient, and otherwise desirable would do a great service to U.S. law. In addition, learning more about foreign thinking on jurisdictional matters could have only a salutary effect on the shape of U.S. law.

The adoption of a new U.S. mindset is the key to a successful negotiating process. Instead of assuming that plaintiffs are entitled to all empowered forums that are not fundamentally unfair to the defendants, the U.S. negotiators should try to specify only the more convenient, efficient, and otherwise desirable of all those forums. That is, they should not try to track precisely the outer limits of due process, but instead should provide merely a short menu of forums with which the world can live. Moreover, they should specify the menu in terms sufficiently clear in order to reduce the high expenditure of resources on forum selection.

Consider jurisdiction for tort cases as an illustration.<sup>133</sup> The treaty might authorize jurisdiction at the place

(a) in which the act or omission that caused injury occurred; or

(b) in which the injury arose, unless the defendant establishes that [it] could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.<sup>134</sup>

This proposed language is a giant step beyond the Brussels Convention's "where the harmful event occurred,"<sup>135</sup> a provision that failed to foresee even the possible separation between the place of the act and the place of the injury.<sup>136</sup> The Hague treaty's proposed language seems to be a decent compromise among different countries' modestly different positions.<sup>137</sup> It approximates the current U.S. reach

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<sup>133</sup> See generally Ronald A. Brand, *Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention*, 24 BROOK. J. INT'L L. 125, 150-55 (1998) (discussing the differences between tort jurisdiction under U.S. law and under the Brussels Convention).

<sup>134</sup> *Treaty Draft*, *supra* note 32, art. 10(1).

<sup>135</sup> Brussels Convention, *supra* note 3, art. 5(3), *reprinted as amended in* 29 I.L.M. at 1419.

<sup>136</sup> See Case 21/76, *Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A.*, 1976 E.C.R. 1735, [1977] 1 C.M.L.R. 284 (1976); Brand, *supra* note 133, at 144-50; Morse, *supra* note 89, at 1024. But see Borchers, *supra* note 89, at 144-46 (praising the Brussels Convention's tort provision as being clear and expansive).

<sup>137</sup> See 1998 *Synthesis*, *supra* note 32, at 33-35; 1997 *Synthesis*, *supra* note 32, at 53-59; Catherine Kessedjian, *International Jurisdiction and Foreign Judgments in Civil and Commercial*

under the Due Process Clause, while its language still attains a fair degree of specificity.<sup>138</sup> Of course, any provision with words like “act or omission that caused”<sup>139</sup> will create some confusion. Further drafting effort could yield greater precision, but the effort’s direction thus far appears appropriate.

Other provisions need more thought and better drafting. For example, language such as, “[f]or contracts made and performed entirely by electronic means, the plaintiff may bring a claim in respect of all his losses in the court of his domicile,” simply will not do.<sup>140</sup> This incredibly broad provision manages to trash both the defendant’s and the public’s interests. Unfortunately, there is no alternative to some hard work by the treaty-makers here.

Finally, and not inconsistently, the resulting provisions should be inclusive enough to relieve the pressure to distort language by expansive judicial interpretation. Here, the progress to date is not encouraging. Huge gaps appear in the proposed treaty. For example, the U.S. team has not pushed strongly enough to preserve the useful aspects of in rem and quasi in rem jurisdiction that permit the adjudication of interests in a thing where the thing is located.<sup>141</sup> Also, the treaty-makers provide no handle on future developments. For example, even the foreseeable changes in the intellectual property and Internet fields go ignored—a strategy that is especially problematic given that the treaty would establish no supranational judicial or legislative body to perform ongoing oversight.

Drafting specific jurisdiction provisions, then, remains a tall order. Terms that optimize policy also must be clear and inclusive, while they bridge the world’s varying mindsets and laws. The task indeed would appear hopeless if the possible compromise of a so-called mixed convention were not lurking in the background.<sup>142</sup> Such a convention would include not only a catch-all blacklist of prohibited jurisdictional bases and a “whitelist” of mandatory bases, but also a “graylist” of permitted bases. A country could exercise jurisdiction to

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Matters, Hague Conf. Prelim. Doc. No. 7, at 70-72, 82 (Apr. 1997); Brand, *supra* note 133, at 150-55; Weintraub, *supra* note 28, at 191-93, 199, 203 (disapproving any “purposefully directed” requirement, but approving a “foreseeability” requirement).

<sup>138</sup> See Brand, *supra* note 133, at 130-43.

<sup>139</sup> *Treaty Draft*, *supra* note 32, art. 10(1)(a).

<sup>140</sup> *Treaty Outline*, *supra* note 32, art. 6, var. 4. Encouragingly, the negotiators dropped this proposal in the latest draft of the treaty. See *Treaty Draft*, *supra* note 32, art. 6.

<sup>141</sup> See Weintraub, *supra* note 28, at 201; cf. *supra* text accompanying notes 109-22 (explaining the treaty’s restrictions on attachment jurisdiction). Compare *Treaty Draft*, *supra* note 32, art. 13 (granting exclusive jurisdiction for actions on rights in immovable property to the country where the property is located), with *1997 Synthesis*, *supra* note 32, at 61 (noting the need for specific jurisdiction with respect to things). The most recent draft of the treaty would permit these nonpersonal bases under a so-called mixed convention. See *Treaty Draft*, *supra* note 32, art. 20(3)(a); *infra* text accompanying note 142.

<sup>142</sup> See von Mehren, *supra* note 6, at 19. But see Juenger, *supra* note 17, at 118-20.

give judgment based on this graylist, but other countries would not have to recognize or enforce that judgment. A mixed convention might not go as far as a double convention in providing global uniformity, but this kind of a mixed convention retains the virtue of specifying U.S. bases of jurisdiction. The accepted U.S. bases would comprise the whitelist plus the U.S.-sponsored entries on the graylist.

Even specification of a graylist might pose too great a drafting challenge, given the time pressure. The temptation will be to supplement the whitelist with a catch-all graylist, which would permit each country to apply those of its own rules of jurisdiction not prohibited by a specific blacklist.<sup>143</sup> This approach greatly facilitates agreement and probably is desirable overall, but it scuttles the treaty's function of requiring a formulation of each signatory's jurisdictional law.

d. *Discretionary Jurisdiction.* The Europeans want mandatory application of a Hagne treaty's rules-based approach. They detest explicit discretion.<sup>144</sup> In response to this, the English surrendered forum non conveniens upon entering the Brussels Convention.<sup>145</sup> The United States also should be willing to abandon the doctrine.<sup>146</sup>

Consider in particular the doctrine of forum non conveniens in the federal courts, which applies primarily when the preferred court is foreign.<sup>147</sup> The doctrine is relatively young, mainly Anglo-American,<sup>148</sup> and quite troublesome. In theory, it allows a federal court discretionarily to decline existing territorial authority to adjudicate, if the court is a seriously inappropriate forum and if a substantially more

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<sup>143</sup> See *Treaty Draft*, *supra* note 32, art. 19.

<sup>144</sup> See REIMANN, *supra* note 105, at 82-85 (discussing continental law's rejection of forum non conveniens); Weintraub, *supra* note 28, at 210-11.

<sup>145</sup> See *supra* note 26 and accompanying text; cf. Friedrich K. Juenger, *Judicial Control of Improper Forum Selection: Some Random Remarks and a Comment on How Not to Do It*, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 311, 314 (Jack L. Goldsmith ed., 1997) (explaining that the English "failed to insist on preserving" forum non conveniens).

<sup>146</sup> By contrast, when parallel proceedings are pending, the power to grant a stay should exist.

A U.S. court under current law may stay its own proceedings in deference to another court's pending proceedings if those related proceedings are in a more appropriate forum. See generally BORN, *supra* note 50, at 459-74. Courts created this discretionary power, which constitutes the vague doctrine of lis pendens, as incidental to their inherent power to control their own dockets. This doctrine is very similar to forum non conveniens, albeit a bit more readily invoked. They differ in that lis pendens requires a pending alternative and also in that stayed proceedings can be more easily revived than dismissed proceedings.

The treaty would provide for lis pendens. See *Treaty Draft*, *supra* note 32, art. 23; 1998 *Synthesis*, *supra* note 32, at 15-16, 40-41; cf. Brussels Convention, *supra* note 3, arts. 21-23, reprinted as amended in 29 I.L.M. at 1423-24 (providing that in a situation of parallel proceedings, a subsequently seised court should stay its proceedings). The treaty's version, however, probably would have a strict preference for the court first seised and be much more rigid than current U.S. law. See Zekoll, *supra* note 105, at 1297-98.

<sup>147</sup> See BORN, *supra* note 50, at 296-97.

<sup>148</sup> See Juenger, *supra* note 145, at 311-13.

appropriate forum is available to the plaintiff. In actual practice, however, it tends to be fatal in application. In a survey of plaintiff's lawyers in the 180 reported transnational cases that the federal courts dismissed from 1947 to 1984 on forum non conveniens grounds, 85 responded; of those 85, no plaintiff won in the foreign court; most cases were either abandoned or settled for little.<sup>149</sup> Now consider three questions that the doctrine's reality raises in general.

First, considering that forum non conveniens has such a stark effect on outcome, is it fair for the court both to ignore changes in applicable law and to dismiss on the basis of mere inconvenience, as suggested in the Supreme Court's ill-conceived *Piper Aircraft Co. v. Reyno*<sup>150</sup>? The answer is no. Forum non conveniens should not expand into a doctrine of inconvenience, but instead should be a doctrine of abuse. The courts should dismiss a suit only when the plaintiff has so abused the privilege of forum selection that, all things considered, exercising jurisdiction would be a miscarriage of justice. In fact, the lower courts seldom grant forum non conveniens dismissals, and the judge commonly conditions any such dismissal on the defendant's varied concessions. Perhaps, then, forum non conveniens remains in practice just such a doctrine of abuse.

Second, if forum non conveniens is only a doctrine of abuse, what does it contribute beyond the Constitution's unreasonableness test? Not much other than multiplying costs and delays, increasing uncertainty, and facilitating discrimination against foreigners. The peculiarities of forum non conveniens often raise intricate questions, requiring extensive investigation and research. The judicial decision is blatantly discretionary, but the Supreme Court ambiguously has blessed various presumptions and weights that can skew that discretion away from fairness. For example, courts stress a presumption in favor of the plaintiff's choice of forum, but only when the plaintiff is a U.S. resident. True, some judicial flexibility in rejecting jurisdiction is desirable, but the unreasonableness test already provides it and subjects it to nondeferential appellate review.

Third, does forum non conveniens not tend to narrow the currently overbroad law of territorial authority to adjudicate? It does, but the United States should approach the goal of narrowing territorial reach openly and directly by legislative reform of jurisdictional and venue rules on the federal and the state levels, rather than surrepti-

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<sup>149</sup> See David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 LAW Q. REV. 398, 418-20 (1987); see also David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353, 378-79 (1994) (arguing for reliable rules to temper judicial discretion and otherwise to narrow forum non conveniens).

<sup>150</sup> 454 U.S. 235 (1981).



tiously and dangerously by embracing forum non conveniens. In short, a decent jurisdictional scheme would eliminate the doctrine of forum non conveniens.<sup>151</sup>

Accordingly, the treaty might narrow or eliminate forum non conveniens, despite U.S. wishes to retain it.<sup>152</sup> Indeed, the treaty should eliminate it. The costs of the doctrine outweigh its benefits; and if the treaty also were to narrow general jurisdiction and refine specific jurisdiction, any benefits of forum non conveniens would all but disappear.

The elimination of forum non conveniens would raise the problem of how U.S. courts could avoid the mandatory exercise of unreasonable jurisdiction. Would there not be an abiding need for judicial discretion to meet this problem? The answer is no for a number of reasons. First, the problem would seldom arise because the treaty's jurisdictional provisions would be sufficiently restrained to stay comfortably within the bounds of reasonableness in almost all cases. The main function of forum non conveniens is to mitigate the abuses of exorbitant jurisdiction, but the treaty would handle those abuses directly by limiting jurisdictional reach.<sup>153</sup> Second, the court usually would be able to avoid unreasonable jurisdiction by narrowly construing the treaty's jurisdictional provisions. The Europeans may detest explicit discretion, for example, but even they implicitly exercise discretion by creative construction, "a little like Monsieur Jourdain in *Le Bourgeois Gentilhomme* who spoke prose without knowing it."<sup>154</sup> Third, in the rarest of cases, where going forward would be fundamentally unfair, the unreasonableness test of the Due Process Clause would rescue the U.S. court from exercising jurisdiction. The Constitution prevails over treaty obligations, even when the respect for due process would lead the United States into a breach of a treaty obligation.<sup>155</sup>

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<sup>151</sup> See Zekoll, *supra* note 105, at 1297-300 (arguing that the rejection of forum non conveniens provides legal certainty and prevents discrimination against foreigners); cf. Currie, *supra* note 87, at 307 ("It would be mellow to try every action in the most convenient forum. But deciding where that forum is costs altogether too much time and money.").

<sup>152</sup> See 1998 Synthesis, *supra* note 32, at 42-44; Note on the Question of "Forum Non Conveniens" in the Perspective of a Double Convention on Judicial Jurisdiction and the Enforcement of Decisions, Hague Conf. Prelim. Doc. No. 3 (Apr. 1996) [hereinafter *Forum Non Conveniens*]; Kessedjian, *supra* note 137, at 40-42; cf. CHRISTOPH DORSEL, FORUM NON CONVENIENS (1996) (criticizing the U.S. doctrine from a European perspective). The most recent draft of the treaty retains a narrow forum non conveniens provision. See *Treaty Draft*, *supra* note 32, art. 24.

<sup>153</sup> See *Forum Non Conveniens*, *supra* note 152, at 2-6.

<sup>154</sup> Catherine Kessedjian, *Judicial Regulation of Improper Forum Selections*, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION, *supra* note 145, at 273, 290 (discussing how the Brussels Convention's tort provision may yield a result similar to forum non conveniens); see *supra* text accompanying notes 135-36.

<sup>155</sup> See *infra* text accompanying notes 166-76.

The ideal solution would be for the U.S. team to insist on a provision allowing refusal of jurisdiction when forbidden by the country's constitution, rather than on a *forum non conveniens* provision. Although applicable only in very rare cases, this solution would capture the valuable core of *forum non conveniens*, while sidestepping most of the treaty's constitutional difficulties.

## 2. *Domestic Law*

As beneficial as a Hague treaty on jurisdiction and judgments could be to narrow general jurisdiction and refine specific jurisdiction through mandatory rules, its international level remains exotic even in today's shrinking world. Most of the jurisdictional action occurs on the domestic front, where the need for reform is most intense. It is this domestic front where the treaty efforts really could pay off.

On the level of domestic law, Congress could follow the Italian model<sup>156</sup> and enact the treaty's jurisdictional provisions as domestic law.<sup>157</sup> That is, once other major countries join the United States in a treaty, Congress could legislate that federal and state courts possess jurisdiction according to the criteria set out in the treaty, regardless of whether the foreign defendant is domiciled in a signatory country. Those criteria usually would place jurisdiction either at the defendant's habitual residence or where a specific part of the events in suit occurred. Then, *all* international cases in U.S. courts, or at least those within the specified substantive types of cases the treaty encompasses,<sup>158</sup> would fall under a uniform and nondiscriminatory jurisdictional law. This step would require giving nonsignatory countries the benefit of the treaty's jurisdictional provisions, but not the much greater benefit of its provisions on recognition and enforcement of judgments. The United States would be giving away a little, while getting the benefits of a uniform jurisdictional law and avoiding the external and internal costs of discrimination against outsiders that the Brussels Convention inflicts.

This relatively modest legislative step would fire the imagination, particularly if the treaty and the federal statute are actually successful in rationalizing practice. Good law that works simply and easily should attract some champions. State legislatures could enact the treaty's jurisdictional provisions as their own law or achieve the same

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<sup>156</sup> See *supra* note 43 and accompanying text.

<sup>157</sup> On drawing lessons from the international arena for procedure in general and jurisdiction in particular, see Burbank, *supra* note 1.

<sup>158</sup> See *Treaty Draft*, *supra* note 32, art. 1 (delineating the treaty's substantive scope).

result through an interstate compact,<sup>159</sup> so that even interstate cases would come within the sweep of the uniform jurisdictional law.

Perhaps such an inspirational role for the treaty is all one reasonably can expect. But inspirations for jurisdictional reform have come and gone over the years. Unfortunately, the states' records of reform in restraining and clarifying their jurisdiction demonstrate that state reform remains a utopian pipe dream.<sup>160</sup> If the states fail to act, Congress could legislate that federal and state courts have jurisdiction according to the treaty's criteria, regardless of whether the defendant is domiciled here or abroad. Of course, this congressional intervention, highly desirable as it may be, is even less likely as a political matter than state reform.<sup>161</sup> But international agreement on the Hague treaty would make dreaming such dreams possible.

What a shame, then, if the treaty negotiations were to fail or retreat to a much reduced scope!<sup>162</sup> The sunk efforts, however, need not go for naught. Reformers, such as the American Law Institute, could use the best U.S. proposal at the Hague to create a model statute that fully formulates the law of territorial jurisdiction. This model could salvage and perfect the attempt to codify specific jurisdiction into restrained and clear mandatory rules and to pare general jurisdiction down to its proper scope, while pushing constitutional limits into the background where they belong. This model statute then could inspire both the states and Congress.

Envisaging these reforms naturally raises a number of concerns, especially with regard to the most extreme recommendation that Congress enact some version of the treaty's provisions for all international and interstate cases in both federal and state courts. Three concerns are obvious enough to warrant discussion.

First, do we want to tie domestic law to the terms of a treaty? This linkage may raise a concern, but it is not really a problem. Blindly carrying the treaty's terms over into domestic law is neither mandatory nor even appropriate. Italy, for example, added residence as a basis for jurisdiction to the Brussels Convention's basis of domicile.<sup>163</sup> Con-

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<sup>159</sup> Cf. Leonard J. Feldman, *The Interstate Compact: A Cooperative Solution to Complex Litigation in State Courts*, 12 REV. LITIG. 137, 138-41 (1992) (explaining the states' power to enter into interstate compacts and the utility of their doing so in order to resolve difficult issues like complex multiforum litigation).

<sup>160</sup> See Martin B. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C. L. REV. 407, 431-32 (1980) (noting pressures on states to expand their reach). Judges tend to compound the problem, as suggested by the spirit of their old maxim, *boni iudicis est ampliare jurisdictionem*, or it is the duty of a good judge to enlarge the jurisdiction.

<sup>161</sup> See Clermont, *supra* note 1, at 442 n.139.

<sup>162</sup> For a suggestion of the odds, see *supra* text accompanying notes 40-41.

<sup>163</sup> See Law No. 218 of May 31, 1995, art. 3(1), Gazz. Uff., Supp. Ord. No. 128, June 3, 1995 (authorizing jurisdiction based on *residenza* or *domicilio*), translated in 35 I.L.M. at 765.

gress should legislate with attention to domestic needs, and it should take the opportunity in its extensions of the treaty to rewrite any distasteful compromises made to secure international agreement. Nevertheless, drafters of a statute should treat the treaty as a presumptively appropriate first draft. After all, internationally agreed norms deserve some respect. Moreover, practical benefits of simplicity and consistency would result from the statute's avoiding unnecessary discrepancies with the treaty.

Second, do we want to federalize jurisdictional law? The recommendation of congressional intervention, on first impression, seems to be such a big step. But the actual change from current practice would be both slight and wholly appropriate. The Supreme Court in large part has already federalized the law of state-court territorial jurisdiction by deriving the operative law from the Due Process Clause. Moreover, the law of interstate and international jurisdiction is inherently a federal interest and within federal powers to regulate. Finally, the states thus far have made poor use of their current powers to restrain their reach and to clarify their jurisdictional law.

Third, do we want to force courts to accept jurisdiction? This concern expresses specifically a general fear of trying to do too much in the way of transporting international reform to the domestic scene. Even if the revolution of a jurisdictional statute came to pass, why make its rules mandatory so that a court with jurisdiction must exercise it? The reason is that the existence of a statute, prohibiting jurisdiction to all but a few courts, naturally would suggest that the proper courts must exercise their jurisdiction. Because the statute would eliminate exorbitant jurisdiction, *forum non conveniens* no longer would be justified.<sup>164</sup> For another example, the need for fraud-and-force and immunity doctrines would disappear with the end of transient jurisdiction. In general, procedural laws that permit courts to decline territorial jurisdiction should suffer repeal.<sup>165</sup>

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<sup>164</sup> The new statute probably should contain a transfer mechanism. See *supra* note 88. The statute probably should have a *lis pendens* provision analogous to the treaty. See *supra* note 146.

<sup>165</sup> Presumably, however, a state could apply a more substantive door-closing statute. For example, a statute might close the courthouse doors to any action brought by a foreign corporation that had failed to comply with a requirement to register before transacting business in the state. This restriction on the plaintiff's qualifications is sufficiently remote from traditional notions of territorial jurisdiction to avoid violating the treaty or federal statute. Moreover, the policy here is more substantive than the desirable distribution among courts of judicial business. Accordingly, a state door-closing statute of this type would apply in federal court under the *Erie* doctrine. See *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538-39 (1949).

## III

## CONSTITUTIONALITY OF REFORM

## A. Can a Treaty or Federal Statute Provide for Jurisdiction That Exceeds Due Process Standards?

The simple answer to this question is no. Not even a treaty can trump the Constitution.<sup>166</sup> Accordingly, good faith requires the U.S. negotiators to insist on a treaty that stays within due process's outer limits. Moreover, the practical demands of public relations during the U.S. ratification process require a treaty that conforms to due process standards.<sup>167</sup>

The treaty, however, could ensure constitutionality by including a provision that allows a court to refuse jurisdiction, or recognition and enforcement, when forbidden by its constitution.<sup>168</sup> Alternatively, if an extraordinary and unexpected case were to arise where treaty jurisdiction proved unconstitutional in application, then the U.S. court could breach the treaty, probably without serious international consequence.<sup>169</sup> Despite these qualifications, the negotiators still should aim for a treaty that stays within the limits of due process.

One could rephrase the titular question into one that is harder: Can a treaty or federal statute provide for jurisdiction that stretches, without exceeding, the limits of due process? Indeed, this question is hard enough to require illustration by specific example. One treaty proposal would create a basis of jurisdiction favoring consumer plaintiffs by allowing suit where the plaintiff is habitually resident at the time of contracting, despite the weakness of the defendant's contacts with that forum. More precisely, jurisdiction might extend to an out-of-state contract claim that does not arise from the plaintiff's business or profession, but relates to the defendant's commercial activities "conducted within or related to the sale, purchase or use of goods or services in" the forum state.<sup>170</sup>

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<sup>166</sup> See *Reid v. Covert*, 354 U.S. 1, 16-19 (1957); Maier, *supra* note 48, at 1209-16 (discussing constitutional limitations on a court applying an international treaty governing jurisdiction); Weintraub, *supra* note 107, at 1274-77.

<sup>167</sup> See Maier, *supra* note 48, at 1215-16.

<sup>168</sup> See *supra* text accompanying note 155. A more complicated drafting solution would be the so-called mixed convention. See *supra* text accompanying note 142.

<sup>169</sup> Cf. Strauss, *supra* note 42, at 1238 (describing consequences of a conflict between a treaty and the Constitution).

<sup>170</sup> *Treaty Outline*, *supra* note 32, art. 7, var. 3; cf. Brussels Convention, *supra* note 3, art. 13, reprinted as amended in 29 I.L.M. at 1421 (covering a person's contract, outside the person's trade or profession but not for transport, that is (i) for the sale of goods on credit or (ii) for the supply of goods or services if advertised at the person's home or if concluded by the person's steps there). The Brussels Convention is now undergoing revision, and the current draft would cover a contract that (i) is for the sale of goods on credit or (ii) falls within the scope of the other party's commercial or professional activities pursued in or directed to the consumer's country. See Working Party on Revision of the Brussels and

Could a treaty or federal statute constitutionally provide for such consumer-contract jurisdiction? When the claim arises out of or sufficiently relates to the defendant's state-directed activity, much of this consumer-contract jurisdiction falls within the Due Process Clause. However, one could hypothesize that a consumer might sue at home on an out-of-state contract, when the defendant's in-state activities are relatively slight and minimally linked to the out-of-state activity from which the claim actually arose. Thus, some of the new consumer-contract jurisdiction, if adopted, would appear to be unconstitutional under current doctrine.<sup>171</sup>

Ever narrowing the question, one could ask: Would the treaty-makers' or lawmakers' affirmative adoption of a consumer-contract provision affect the constitutionality of this jurisdiction? Presumably, the negotiated, agreed, and accepted treaty's terms or the enacted statute's terms for protecting consumers would pass the unreasonableness test.<sup>172</sup> The United States Supreme Court would find it difficult to hold this consumer-contract jurisdiction unreasonable when the international community and Congress have settled on this kind of jurisdiction.<sup>173</sup> Indeed, the Supreme Court traditionally has taken into account legislative views on jurisdictional reasonableness.<sup>174</sup>

The high hurdle, then, is the power test. One could certainly argue that the time has come for the Court to jettison the power test as an unsound scheme for the allocation of territorial jurisdiction.<sup>175</sup> However, the negotiators cannot responsibly proceed on the assumption that the Court would do so.<sup>176</sup> Instead, they must face this difficult question: Would consumer-contract jurisdiction, if adopted, run aground on the power test? It is necessary to address this question in the context of both international and domestic litigation.

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Lugano Conventions, *Revised Meeting Document No. 18*, Doc. SN 2581/1/99 REV 1, at 9 (Apr. 26, 1999). Similarly, the Hague treaty is moving toward a "purposefully directed" requirement minimizing the constitutional problem. The most recent draft extends jurisdiction to an out-of-state consumer contract only if it relates to the defendant's trade or professional activities engaged in or directed to the forum state and if the plaintiff has taken the steps necessary for the conclusion of the contract in the forum state. See *Treaty Draft*, *supra* note 32, art. 7(1).

<sup>171</sup> See, e.g., *Ratliff v. Cooper Lab.*, 444 F.2d 745, 748 (4th Cir. 1971) (holding occasional in-state sales of the same drug to be insufficiently related to the out-of-state sale to support jurisdiction).

<sup>172</sup> See Borchers, *supra* note 97, at 1173-75.

<sup>173</sup> See Juenger, *supra* note 17, at 122-23.

<sup>174</sup> See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 214-15 (1977); *Hanson v. Denckla*, 357 U.S. 235, 252-53 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 221, 224 (1957); see also Borchers, *supra* note 89, at 154.

<sup>175</sup> See *supra* text accompanying note 83.

<sup>176</sup> See Weintraub, *supra* note 107, at 1273-74.

### 1. *International Litigation*

The context of international litigation is a peculiar one for addressing this hard question. The only cases in U.S. courts that would raise this question directly would be suits against foreigners. Courts have never definitively held that foreigners have a constitutional right to contest territorial jurisdiction by invoking any or all of substantive due process.<sup>177</sup> Hence, the more troubling constitutional question might arise when a U.S. court enforces a foreign judgment based on the treaty's consumer-contract jurisdiction against a U.S. defendant. Here too, however, the case would not immediately involve due process because the courts have never firmly established that a litigant can raise the substantive due process power test to defeat a foreign judgment.<sup>178</sup> Nevertheless, if a U.S. court would allow a defendant to raise the power test against such a present or prior exercise of consumer-contract jurisdiction, the court would face the difficult question of whether the treaty could supplant the power test in international litigation. At present, the answer to this novel question must remain in terms of likelihood.

Such a "stretching" of due process by the treaty likely would fall within the U.S. treaty-makers' constitutional mandate. The task of allocating jurisdiction is nonjudicial in nature, although the Supreme Court has performed this function by default in the past. The treaty-makers have extensive powers under the foreign relations and commerce headings.<sup>179</sup> As long as they responsibly perform the legislative function of allocating jurisdiction, the Court likely will step aside and accept their articulation of the power test. Therefore, the treaty ought to be able to supplant the moribund power test for the allocation of territorial authority on the international level.

### 2. *Domestic Litigation*

If Congress were to extend the treaty's provisions fully into domestic law, the resulting statute then would raise the due process issue in pure form. A U.S. defendant could claim a violation of due process, if a plaintiff tried to use consumer-contract jurisdiction against the defendant in state court.

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<sup>177</sup> See BORN, *supra* note 50, at 92; Strauss, *supra* note 42, at 1256 n.93.

<sup>178</sup> See Willis L.M. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 786-87 (1950) (explaining that U.S. courts at times apply only the reasonableness test); Hans Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 UCLA L. REV. 44, 47 (1962) (explaining that the issue in determining the validity of foreign judgments is "whether it would be unfair or arbitrary to hold binding on the parties involved a judgment obtained in the foreign proceedings under inspection").

<sup>179</sup> See Borchers, *supra* note 97, at 1164-73.

Yet the same argument still should prevail, so that the statute would supplant the moribund power test in the allocation of territorial authority on the interstate level. Here, Congress's powers are just as extensive as the treaty-makers'. On the interstate front, Congress could rest its action on either the Commerce Clause or the provision of the Full Faith and Credit Clause that empowers it to prescribe the effect of sister-state judgments.<sup>180</sup>

## B. Can a Treaty or Federal Statute Force the States to Accept Jurisdiction?

The answer to this question is a complicated yes. The question is so difficult as to lead some to suggest that Congress might want to duck it by expanding federal *subject-matter* jurisdiction to open the federal courts whenever the treaty or federal statute authorizes *territorial* jurisdiction that the state refuses to exercise. The states have little interest in declining their maximum jurisdiction, so in practice, few cases would follow this route into federal court. Arguably, then, opening the federal-court route might be preferable to forcing a test of congressional powers.

However, a new head of subject-matter jurisdiction would cause many problems and spawn wasteful litigation. Therefore, it is ultimately worth considering the actual limit on congressional powers. The question is again hard enough to necessitate an example. Although one could stick with the example of Congress's imposing new consumer-contract jurisdiction on the states, one instead could imagine a *Bhopal*-type case<sup>181</sup> in a state court against a local corporate defendant. Imagine that the state court formerly would have applied *forum non conveniens*, but Congress now has directed the state court to hear the case. Would Congress's action be consistent with the Constitution?

### 1. *International Litigation*

If the treaty makes exercise of its jurisdiction mandatory in the international cases, Congress then might pass this obligation on to the states. If the states balked, however, the hard question of congressional powers would arise.

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<sup>180</sup> See Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 852 (1989). But see Stanley E. Cox, *Why Properly Construed Due Process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions*, 61 ALB. L. REV. 1177, 1195-97 (1998).

<sup>181</sup> See *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987).



Congress arguably has the substantive power to instruct the states to exercise full territorial jurisdiction for, say, admiralty cases.<sup>182</sup> Indeed, it remains an open question whether the federal common law of forum non conveniens, even without a statutory directive, displaces state law when state courts entertain international admiralty cases.<sup>183</sup> But in implementing the treaty, Congress might broadly command the states to exercise territorial jurisdiction in all sorts of cases, such as run-of-the-mill tort cases. It would be difficult to argue that federal substance-specific constitutional authority reaches far enough for Congress to impose a general obligation on the states to hear all cases covered by the treaty. However, as already explained, Congress has extensive general powers under the foreign relations and commerce headings.<sup>184</sup> Thus, Congress presumptively has authority wide enough to encompass the jurisdictional command to the states.

Yet, could Congress force the states to exercise territorial jurisdiction as provided by the treaty without violating the Tenth Amendment? The Tenth Amendment argument in this situation is often a paper tiger.<sup>185</sup> Nevertheless, at its affirmative core, the Tenth Amendment prevents Congress from directly ordering the states to take governmental action.<sup>186</sup> According to the Supreme Court's recent pronouncements, however, this prohibition extends only to the state executive and legislature.<sup>187</sup> Congress therefore can tell the state courts to hear cases of federal concern.<sup>188</sup>

## 2. Domestic Litigation

If Congress were to extend the treaty's provisions into domestic cases, the legislators would find it desirable, although not necessary,

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<sup>182</sup> See David S. Welkowitz, *Beyond Burger King: The Federal Interest in Personal Jurisdiction*, 56 *FORDHAM L. REV.* 1, 49-51 (1987).

<sup>183</sup> See *American Dredging Co. v. Miller*, 510 U.S. 443, 457 (1994).

<sup>184</sup> See *supra* text accompanying notes 96-97, 180.

<sup>185</sup> See *Missouri v. Holland*, 252 U.S. 416, 432 (1920) ("To answer this question it is not enough to refer to the Tenth Amendment . . ."); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 188-94, 217-19 (5th ed. 1995).

<sup>186</sup> See *Printz v. United States*, 521 U.S. 898, 923-24 (1997); *New York v. United States*, 505 U.S. 144 (1992); RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 476-78 (4th ed. 1996).

<sup>187</sup> See *Printz*, 521 U.S. at 907-12 (dictum); *FERC v. Mississippi*, 456 U.S. 742, 759-70 (1982). But cf. Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 *SUP. CT. REV.* 199, 212-17 (criticizing the judicial exemption in *Printz*).

<sup>188</sup> See *Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding that a state court cannot refuse to hear a claim based on the Emergency Price Control Act when the court hears the same type of claim arising under state law); cf. *Douglas v. New York, New Haven & Hartford R.R.*, 279 U.S. 377, 387-88 (1929) (holding that the duty of state courts to hear FELA claims is excused when the claim is blocked by a nondiscriminatory state door-closing statute similar to forum non conveniens).

to make the jurisdiction mandatory for interstate cases. Thus, the same question of congressional powers would arise.

Although its foreign relations power drops out of the picture, Congress still has extensive domestic authority to command the states to exercise territorial jurisdiction.<sup>189</sup> The Tenth Amendment counterargument remains unavailing for the reasons already given.

In fact, one could argue that even in the absence of an explicit congressional command, the states would have to exercise full jurisdiction under the treaty and statute. If the states were to refuse to hear international and interstate cases in specified categories or through case-by-case balancing, the states' discrimination against federal concerns would violate the *Testa* doctrine.<sup>190</sup> The state-law doctrines of concern here would be coterminous with the groups of cases that Congress had specified through the treaty and statute as holding a special federal interest. After all, the states entertain similar claims that are local in nature, and the Supreme Court currently draws analogies between federal and state claims at a high level of generic abstraction.<sup>191</sup> The states therefore could not single out for discriminatory treatment the international and interstate cases the federal government had agreed and decreed that U.S. courts could entertain.

A broader and less awkward way to view the problem is through the lens of a reverse-*Erie* displacement of state procedure,<sup>192</sup> rather than a *Testa* jurisdictional analysis. On the issue of territorial jurisdiction, the special federal interests that the treaty and statute would express, and the federal interests in avoiding forum-shopping and inequitable administration of the laws, overcome a state's interests in having its law limit international and interstate reach.<sup>193</sup> The federal law extending reach beyond state law therefore would apply in state court with binding force under the Supremacy Clause.

#### CONCLUSION

The United States should vigorously pursue its interests while negotiating the Hague multilateral convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It then should sign and ratify the expected agreement, even

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<sup>189</sup> See *supra* text accompanying notes 96 & 180.

<sup>190</sup> See *Howlett v. Rose*, 496 U.S. 356, 369-70 (1990); *Testa*, 330 U.S. at 394; *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 233-34 (1934); *Mondou v. New York, New Haven & Hartford R.R.*, 223 U.S. 1, 55-58 (1912); FALLON ET AL., *supra* note 186, at 472-76.

<sup>191</sup> See Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. REV. 39, 169-70.

<sup>192</sup> See *Howlett*, 496 U.S. at 375-78; *Felder v. Casey*, 487 U.S. 131, 139-41 (1988); Collins, *supra* note 191, at 180-83.

<sup>193</sup> See Welkowitz, *supra* note 182, at 49-51.

if that means abandoning transient jurisdiction, attachment jurisdiction, doing business as a basis for general jurisdiction, and forum non conveniens.

Indeed, Congress then should consider following the Italian model of enacting the jurisdictional part of the treaty as domestic law. Even if treaty negotiations fail, Congress should consider enacting the best U.S. proposal made at the Hague. It should legislate that federal and state courts, not only in all international cases but even in interstate cases, possess jurisdiction if and only if the case's circumstances satisfy the treaty's or the proposal's analogous jurisdictional provision.

These reforms are within the treaty-makers' and Congress's powers. The reforms would work wonders in untangling the mess that is the U.S. law of territorial jurisdiction in civil cases.

## APPENDIX

## REFORM OF THE ITALIAN SYSTEM OF PRIVATE INTERNATIONAL LAW

Law No. 218 of May 31, 1995, Gazz. Uff., Supp. Ord. No. 128, June 3, 1995, *translated in* 35 I.L.M. 765, 1144 (1996).

*Article 1 (Scope of application)*

1. This law shall determine the Italian jurisdiction, lay down the criteria to identify the applicable law, and govern the effects of foreign judgments and acts.

*Article 2 (International conventions)*

1. The provisions of this law shall not affect the application of any international conventions to which Italy is a party.

2. The interpretation of those conventions shall take account of their international character as well as of the need for uniform application.

*Article 3 (Scope of jurisdiction)*

1. Italian courts shall have jurisdiction if the defendant is domiciled or resides in Italy or has a representative in this country who is enabled to appear in court pursuant to Article 77 of the Code of Civil Procedure, as well as in the other cases provided for by law.

2. Italian courts shall further have jurisdiction according to the criteria set out in [the long-arm provisions in Articles 5-15 of the Brussels Convention], including when the defendant is not domiciled in the territory of a contracting State, with respect to any of the matters falling within the scope of application of the Convention. With regard to other matters, jurisdiction shall be also determined according to the criteria laid down for territorial jurisdiction.

*Article 4 (Acceptance and derogation of jurisdiction)*

1. Where jurisdiction cannot be determined pursuant to Article 3, Italian courts shall nonetheless have jurisdiction if the parties have agreed to it and such acceptance is evidenced in writing, or if the defendant enters an appearance without pleading the lack of jurisdiction in his statement of defense.

2. The jurisdiction of any Italian court may be derogated from by an agreement in favor of a foreign court or arbitration if such derogation is evidenced in writing and the action concerns alienable rights.

3. Derogation shall have no effect if the court or the arbitrators decline jurisdiction or cannot hear the action.

*Article 5 (Actions concerning rights in rem in immovables situated abroad)*

1. Italian courts shall have no jurisdiction over actions concerning rights in rem in immovables situated abroad.

*Article 6 (Preliminary questions)*

1. Italian courts shall have incidental cognizance of questions which do not fall within the scope of Italian jurisdiction, where their settlement is necessary in order to decide on an action brought to court.

*Article 7 (Lis pendens)*

1. Where in a proceeding a plea of lis pendens is brought concerning an action between the same parties having the same object and the same title, the Italian court may stay the proceeding if it deems that the decision of the foreign court may produce an effect in the Italian legal system. If the foreign court declines its jurisdiction or the foreign decision is not recognized under Italian law, the Italian court shall continue the proceeding upon the application of the party concerned.

2. The condition of lis pendens shall be established pursuant to the law of the State where the action is brought.

3. If the outcome of a proceeding in an Italian court depends upon the outcome of a proceeding pending before a foreign court, the Italian court may stay its proceeding where it deems that the foreign judgment may produce an effect in the Italian legal system.

*Article 8 (Time element for determining jurisdiction)*

1. Article 5 of the Code of Civil Procedure shall apply when determining the jurisdiction of Italian courts. However, an Italian court shall have jurisdiction if the facts and rules determining jurisdiction supervene in the course of the proceeding.

*Article 9 (Voluntary jurisdiction)*

1. In matters of voluntary jurisdiction, Italian courts shall have jurisdiction, in addition to the cases specifically referred to in this law as well as whenever the territorial jurisdiction of an Italian court is provided for, if the decision which is sought concerns either an Italian national or a person who is resident in Italy, or where the decision concerns situations or relationships to which Italian law applies.

*Article 10 (Provisional measures)*

1. With respect to provisional measures, Italian courts shall have jurisdiction if such measures are to be enforced in Italy or an Italian court has jurisdiction over the merits.

*Article 11 (Pleading lack of jurisdiction)*

1. Only the defendant who entered an appearance and did not accept the jurisdiction of an Italian court, either expressly or tacitly, may plead lack of jurisdiction at any stage and in any instance of a proceeding. The court shall plead lack of jurisdiction *ex officio*, at any stage and degree of a proceeding, if the defendant is in default, if the circumstances referred to under Article 5 apply, or if the jurisdiction of Italian courts is ruled out under an international agreement.

*Articles 12-74*

[omitted]